Supreme Court, U.S.
FILED
JUN 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ELISA CHAN, et al.,

Petitioners,

vs.

KOREAN AIR LINES, LTD.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONERS

MILTON G. SINCOFF
(Counsel of Record)
STEVEN R. POUNIAN
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181

DONALD W. MADOLE
SPEISER, KRAUSE & MADOLE
1216 16th Street, N.W.
Washington, D.C. 20036
(202) 223-8501

Attorneys for Petitioners
Elisa Chan, et al. and
Plaintiffs' Steering Committee

QUESTION PRESENTED

In death actions governed by the Warsaw Convention Treaty and Montreal Agreement, may the airline have its liability limited to $75,000 where it failed to give the required warning of that limitation to its passengers?

LIST OF PARTIES TO THE PROCEEDING

The following plaintiffs are parties to this proceeding: Elisa Chan, Roberta Cruz, Hans Ephraimson-Abt, Willie James, Dorothy Jones, Michael D. Jones, Betty B. S. Lim, In Jig Lin, Marsha Maikovich, Louella Nassief, Kyung Hwa Park, Barbara Swift, Christina Ting, David WuDunn, Sung Wha Yoo and Marjorie Zicherman. After the motion below was filed, additional actions were commenced and are not formally included in this appeal, but involve the same issue. The plaintiffs in those actions are: Robert Boyar, Evelyn Chauncey, William Cunningham, Lenore Lebow, Katherine McDonald, William Stevens and Terry Weng. The defendant is Korean Air Lines, Ltd.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Provisions of Law Involved	2
Statement of the Case	2
Summary of Argument	5
Argument	8
I. Actual Damages Are Fully Recoverable Unless the Airline Adequately Warns Its Passenger Of The Warsaw Limit	8
II. Having Induced The United States To Cancel Its Withdrawal From the Treaty In Exchange For the Montreal Agreement, Airlines Were Required To Warn Passengers Of The Damage Limit In The Specified Manner To Invoke The Limit	15
III. KAL Is Liable For Actual Damages Without Arbitrary Limit Because It Failed To Adequately Warn The Passengers Of That Limit	20
A. The Agreement and regulation have the force of law and implement the Treaty	21
B. Having failed to provide the Article 3 warning in 10 point type print, KAL may not assert the damage limit	24

PAGE

C. KAL's admitted breach of contract results in loss of the damage limit 26

IV. The History Of The Treaty Demonstrates That The Warning Was A Prerequisite For The Limitation 29

A. The Paris Conference of 1925 29

B. The CITEJA Draft 30

C. The Warsaw proceedings of 1929 33

D. The Hague Convention of 1955 37

E. The United States position 38

CONCLUSION 40

TABLE OF AUTHORITIES

PAGE

Air France v. Saks, 470 U.S. 392 (1985)....8, 11, 12, 29

Bacardi Corp. v. Domenech, 311 U.S. 150 (1940).. 11

Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968) 9, 13n, 16n, 30

DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3rd Cir. 1978) 13n

Deutsche Lufthansa v. Civil Aeronautics Board, 479 F.2d 912 (D.C. Cir. 1973).....6, 11, 21, 23, 24

Egan v. Kollsman Instrument Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968) 7, 11, 14, 15

Factor v. Laubenheimer, 290 U.S. 276 (1933) 11

In re Air Crash Disaster at Warsaw, Poland, 535 F.Supp. 833 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) ....*passim*

In re Air Crash Disaster Near New Orleans, Louisiana, 789 F.2d 1092 (5th Cir.), *reh'g granted*, 795 F.2d 381 (5th Cir. 1986), *reinstated*, 821 F.2d 1147 (5th Cir. 1987) (en banc), *petition for cert. filed sub nom.*, Pan American World Airways v. Lopez, 55 U.S.L.W. 3369 (U.S. Nov. 6, 1987) (No. 87-750).....7, 11, 20

In re Korean Air Lines Disaster, 575 F.Supp. 342 (J.P. M.L. 1983) 3

PAGE

Kelley v. Societe Anonyme Belge d'Exploitation, 242 F.Supp. 129 (E.D.N.Y. 1965) 16n

Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968) 5, 11, 12, 27

Ludecke v. Canadian Pacific Airlines, 98 D.L.R.3d 52 (Can. 1979).....21, 36

Manion v. Pan American World Airways, 55 N.Y.2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982).....7, 11, 13n

Mertens v. Flying Tiger Line, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).....7, 11, 13, 36

Molitch v. Irish International Airlines, 436 F.2d 42 (2d Cir. 1970)..... 10n

Reed v. Wiser, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977)..... 38

Ross v. Pan American Airways, 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert. denied*, 349 U.S. 947 (1955)..... 16n

Stratis v. Eastern Airlines, 682 F.2d 406 (2d Cir. 1982) 35

Trans World Airlines v. Franklin Mint, 466 U.S. 243 (1984) 9, 15, 21, 23

Warren v. Flying Tiger Line, 352 F.2d 494 (9th Cir. 1965) 7, 11, 13

PAGE

Statutes, Rules and Regulations:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 4

28 U.S.C. § 1407.....3, 4n

49 U.S.C. § 1302..... 21

49 U.S.C. § 1324(a) 21

49 U.S.C. § 1382..... 21

49 U.S.C. § 1502..... 21

14 C.F.R. § 213.7 ..... 2, 18

14 C.F.R. § 221.175(a)..... 2, 19

31 Fed. Reg. 7302 (1966), reprinted in 49 U.S.C. § 1502 note..... 16

66 Fed. Reg. 3281 (1963) 19

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. § 1502 note (Warsaw Convention).....*passim*

Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900, Approved by Executive Order E-23680, May 13, 1966 (Docket 17325), (1966), reprinted in Civil Aeronautics Board, Aeronautical Statutes and Related Material 515-16 (1974) (Montreal Agreement) .....*passim*

PAGE

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955, 478 U.N.T.S. 371 37

Other Authorities:

Affidavit of Frank L. Houston dated July 9, 1986, *In re Korean Air Lines Disaster*, M.D.L. 565 (D.D.C.) 3n

Brief for United States, Pan American World Airways v. Lopez, 55 U.S.L.W. 3369 (U.S. Nov. 6, 1987) (No. 87-750)..... 24

Comite International Technique D'Experts Juridiques Aeriens, Compte Rendu Provisoire (Second Session, April 1927) 32n

Comite International Technique D'Experts Juridiques Aeriens, Compte Rendu Provisoire (Third Session, May 1928).....31, 32

Conference Internationale de Droite Prive Aerien (Paris 1926).....9, 29, 30

International Conference on Private Air Law, The Hague, 1955 .....18, 24, 37

Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967).....*passim*

Memorandum for Amicus Civil Aeronautics Board (merits stage) Lisi v. Alitalia, 390 U.S. 455 (1968) 19

PAGE

Memorandum for Amicus United States (jurisdictional stage), Lisi v. Alitalia, 390 U.S. 455 (1968) 12, 25

National L. J., May 23, 1988 ..... 17n

Restatement of Foreign Relations Law § 147..... 11

Second International Conference on Private Aeronautical Law (R. Horner & D. Legrez trans. 1975) 21, 31, 33, 36

12 Williston on Contracts (3rd ed. 1970) 26

50 Dept. State Bull. 923 (1965)..... 17n

Y.J. Blanc-Dannery, Convention de Varsovie (Paris 1933) 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1055

ELISA CHAN, et al.,

Petitioners,

—v.—

KOREAN AIR LINES, LTD.,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (JA 376)[1] is reported at 829 F.2d 1971 (D.C. Cir. 1987). It adopted the first district court opinion (JA 387), reported at 664 F.Supp. 1463 (D.D.C. 1985). The second district court opinion (JA 372) is reported at 664 F.Supp. 1488 (D.D.C. 1987).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 25, 1987. The petition for a writ of certiorari was filed

---

1 "JA" refers to the Joint Appendix and "App" refers to the Appendix at the end of this brief.

on December 23, 1987 and granted on April 4, 1988. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

This case involves the Warsaw Convention Treaty,[2] the Montreal Agreement[3] and two Federal Aviation Regulations.[4] Their pertinent provisions are set forth in the appendix to this brief.

STATEMENT OF THE CASE

Petitioners are the surviving family members and estate representatives of eighteen passengers killed in the Korean Air Lines catastrophe of September 1, 1983. KAL flight 7 departed from Kennedy Airport, New York, bound for Seoul, South Korea. Instead of following the prescribed safe route over international waters, the pilots flew the plane more than three hundred miles off course into the airspace and over the land of the Soviet Union. There a

2 A Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. § 1502 note. (App 1).

3 Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900, Approved by Executive Order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966), reprinted in Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 515-16 (1974). (App 8).

4 14 C.F.R. § 221.175(a); 14 C.F.R. § 213.7. (App 11, 13).

Soviet military fighter aircraft shot at and struck the KAL plane which crashed, killing all 269 aboard.[5]

Each of these cases is governed by the Warsaw Convention Treaty and the Montreal Agreement. In 1934, the United States became a party to the Treaty. It limited an airline's liability for an international accident to $8,300, provided the airline warned the passenger of the damage limitation.

Over thirty years later, dissatisfaction with the limit caused the United States to announce its withdrawal from the Treaty. Numerous airlines then signed the Montreal Agreement.[6] The Agreement provided for a $75,000 limit, no fault liability and a large print warning of the damage limit. In exchange, the United States continued as a party to the Treaty. A federal regulation also mandated all airlines give the same large print warning. (App 11-12).

KAL failed to give the required warning to the passengers involved in appellants' cases. (JA 12-14, 19, 28-119, 388). But the airline was granted the damage limit by the decision of the court below. (JA 387).

Wrongful death actions were commenced against KAL in various federal district courts, predominantly in New York. Upon KAL's motion, the cases were transferred to the District of Columbia for pretrial discovery proceedings pursuant to 28 U.S.C. § 1407. *In re Korean Air Lines Disaster*, 575 F.Supp. 342 (J.P.M.L. 1983).

5 Only five years earlier, another KAL flight crew committed a similar error with fatal consequences. In April 1978, on a flight from Paris to Seoul, a KAL passenger jet was flown off course into Soviet airspace. It was fired upon by a Soviet fighter, struck and crash landed in Siberia, killing and injuring several passengers. Affidavit of Frank L. Houston dated July 9, 1986, *In re Korean Air Lines Disaster*, M.D.L. No. 565 (D.D.C.).

6 KAL signed in 1969. (JA 19, 21).

On February 15, 1984, the plaintiffs moved for partial summary judgment declaring that KAL was liable for actual damages, having lost the benefit of the Warsaw/Montreal damage limitation by delivering inadequate warnings to twenty-three passengers. (JA 9). Subsequently, five of those actions were dismissed and actions were commenced for the deaths of seven other passengers who received improper warnings.

On July 25, 1985, the district court rendered its memorandum and order denying plaintiffs' motion and declaring that KAL was entitled to the $75,000 damage limit. The issue was certified for appeal and leave to appeal was granted pursuant to 28 U.S.C. § 1292(b). (JA 366-368).

Following oral argument, the Court of Appeals remanded the appeal for further findings on the issue of whether the district court was bound to apply the decisions of the Court of Appeals for the Second Circuit in the eleven death actions originally filed in New York and transferred to the District of Columbia for discovery purposes. (JA 370). On May 7, 1987, the district court ruled that it was not bound by Second Circuit precedent. (JA 372).[7]

On September 25, 1987, the District of Columbia Circuit affirmed, adopting the first district court memorandum as its opinion. (JA 376).

---

7 This brief does not address an additional procedural question raised by the decision below: following a transfer for pretrial proceedings under 28 U.S.C. Section 1407, is the transferee court required to apply the substantive federal law existing in the transferor court? This issue is moot because the Court has granted certiorari to decide the Warsaw/Montreal issue. Nevertheless, the procedural question is also the subject of a conflict among the Circuits and the Court may desire to address the issue to provide needed guidance in future cases.

Plaintiffs petitioned this Court for certiorari on December 23, 1987, noting the conflict of the opinion below with decisions of the Second, Fifth, Ninth Circuits and another panel of the District of Columbia Circuit. Certiorari was granted on April 4, 1988.

SUMMARY OF ARGUMENT

The Warsaw Treaty requires an airline deliver to each passenger a ticket warning of the damage limitation. Failure to warn denies the airline the benefit of the limit and allows recovery of actual damages for the passenger's death or injury.

Both the language and intent of the drafters of the Treaty dictate those consequences. The warning was the *quid pro quo* for limited damages and designed to afford the passenger the opportunity to take self-protective measures, such as purchasing accident insurance.

At various times, airlines delivered tickets with small print warnings or while passengers were boarding aircraft. An unbroken line of eight appellate federal and state court decisions over two decades uniformly held those airlines liable for actual, not limited damages for failure to adequately warn the passengers of the Treaty limit.

This Court, in an equally divided ruling, affirmed the Second Circuit holding that an airline which delivered a warning in inadequately sized print could not assert the limitation. *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968) (hereinafter cited as *Lisi v. Alitalia*). With the sole exception of the decision below, *Lisi* has been uniformly followed by United States courts, including the

District of Columbia Circuit. *Deutsche Lufthansa v. Civil Aeronatics Board*, 479 F.2d 912, 917 (D.C.Cir. 1973).

Contrary to all prior United States authority, the court below held that delivery of a ticket invoked the damage limit, irrespective of whether the airline gave any or adequate warning to the passenger. That decision not only contravenes the Convention's language and history, but the airline's contract and a federal regulation as well.

In 1963, the United States established by regulation a uniform minimum standard for the Warsaw damage limitation warning—print of at least 10 point size.

In 1965, our government denounced the Treaty because of its low damage limit. International and domestic airlines then drafted and signed the Montreal Agreement, a special contract applicable only to international transportation involving places in the United States. The Agreement provided for no fault liability for a damage maximum of $75,000.

The airlines further stipulated in the Agreement to provide each passenger with a specific damage limitation warning printed in at least 10 point type. That provision responded to our government's demands that if any arbitrary limit was to apply, passengers must receive a proper notice in large type print before boarding.

Relying on and formally approving the Agreement, the United States cancelled its withdrawal from the Treaty. Although the airlines asserted that the Montreal Agreement would be an interim arrangement lasting several years as a bridge to a new treaty with a higher limit or no limit, the Agreement has remained in effect for over twenty years.

KAL signed the Agreement and was allowed to operate flights in the United States by a permit conditioned upon

compliance with the Agreement. For more than a decade before this crash, KAL was fully aware that its failure to adequately warn would render it liable for actual damages without the arbitrary limit.

Squarely in point are decisions of the Second and Fifth Circuits. *In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) (hereinafter cited as *Polish Airlines*); *In re Air Crash Disaster near New Orleans, Louisiana*, 789 F.2d 1092 (5th Cir.), *reh'g granted*, 795 F.2d 381 (5th Cir. 1986), *reinstated*, 821 F.2d 1147 (5th Cir. 1987) (*en banc*), *petition for cert. filed sub nom., Pan American World Airways v. Lopez*, 55 U.S.L.W. 3369 (U.S. Nov. 6, 1987) (No. 87-750) (hereinafter cited as *Pan American Airways*). Both held that airlines lost the limitation by delivering tickets with warnings printed in smaller than the minimum 10 point size. That minimum standard was properly determined by the Executive Branch, approved by the airlines, has the force of law and implements the Treaty.

A series of other appellate decisions denied the damage limit for an airline's failure to give adequate or timely warning. *Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965); *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Manion v. Pan American World Airways*, 55 N.Y.2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982); *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

For the past two decades, nearly all international airlines have complied with their obligations and gained the damage limit by the facile act of adequately warning passengers.

The decision below held that since tickets were delivered, damages were limited and KAL's breach of its con-

tract and violation of the federal regulation were of no consequence in this litigation. That result fails to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399 (1985).

The Solicitor General of the United States previously supported the *Lisi* decision of the Second Circuit as well as grant of certiorari and reversal in the actions at bar.

This Court should reverse by virtue of the Treaty's terms and articulated intent; the contractual and regulatory requirements; and to restore the *quid pro quo* relied upon by the United States in continuing with the Warsaw/Montreal system.

ARGUMENT

I

ACTUAL DAMAGES ARE FULLY RECOVERABLE UNLESS THE AIRLINE ADEQUATELY WARNS ITS PASSENGER OF THE WARSAW LIMIT

The Warsaw Convention was concluded in 1929 and signed by the United States in 1934. The aviation industry was then in its infancy with commercial flight viewed as involving substantial risk. A damage ceiling was thought to be necessary to obtain insurance and attract capital. Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 498-499 (1967) (hereinafter cited as Lowenfeld).[8] Thus, the Treaty's Article 22 provided for limited recovery for each passenger injury and death of 125,000 French gold francs,

8 The cited law review article was co-authored by Andreas Lowenfeld, Chairman of the United States Delegation to the Montreal Conference in 1966. *Id.* at 497 n.

about $8,300. *See Trans World Airlines v. Franklin Mint*, 466 U.S. 243 (1984).

In return for the damage limit, the Convention imposed a presumption of liability on the airline in Article 17 and required in Article 3 that the airline deliver a ticket to its passenger which contained a statement warning of the limit.

The language and stated intent of the drafters of Article 3 made the damage limit unavailable to an airline which failed to adequately warn the passenger.

At the first drafting session, it was agreed that passengers should be put on an "equal footing" with the airline and informed of the limitation. Conference Internationale de Droite Prive Aerien 56, 78 (Paris 1926) (App 23, 29 translated at App 58, 65).

Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), acknowledged this intent:

> The contract plays a role fundamental to the objectives of the Warsaw Conference. The obligations arising from the contract between the carrier and the passenger carry out *the Conference goal that the rules of limited liability be known to both parties*. This knowledge enables the passenger to determine in advance the amount of insurance he needs [and] permits the carrier's insurer to gauge the carrier's long-term risk, and act accordingly . . . *Id.* at 333-334 (emphasis added).

The warning was characterized by the drafters to be so indispensable and compulsory as to cause the airline to lose the damage limit. Point IV, *infra* at 29 through 36, details the drafting history.

This intent was fulfilled by the language of Article 3. Its subdivision (1) provides that "the carrier *must* deliver a passenger ticket which *shall* contain" five specified particulars (emphasis added). The first four involve insertions for each passenger's personal flight itinerary and details. The last particular is the invariable requirement common to all passengers: "a statement that the transportation is subject to the rules relating to liability established by this convention."

Article 3(2) provides that if the prescribed ticket is not delivered to the passenger, the Convention still applies, but the limitation is unavailable to the airline:

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, *if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.* (Emphasis added).[9]

The decision below is the lone deviation from an unbroken line of eight United States appellate court decisions over two decades which uniformly held that an airline's failure to adequately warn a passenger negates the damage

9 Pursuant to the first sentence, where an inadequate ticket is delivered, certain Convention provisions, such as the two year statute of limitations and jurisdictional restrictions, still apply. *See Polish Airlines*, 705 F.2d 85, 91 (2d Cir. 1983); *Molitch v. Irish International Airlines*, 436 F.2d 42 (2d Cir. 1970) (two year statute of limitation imposed under Warsaw Convention regardless of notice provided to passenger). Indeed, many passengers aboard flight 7 received small print tickets, but their families have been barred from suing KAL in United States courts by Article 28's jurisdictional rules.

limit despite delivery of a ticket. *Lisi v. Alitalia*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968); *Pan American Airways*, 789 F.2d 1092, 1098 (5th Cir. 1986); *Polish Airlines*, 705 F.2d 85, 89-91 (2d Cir. 1983); *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973); *Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965); *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Manion v. Pan American World Airways*, 55 N.Y.2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982); *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

These appellate courts held that adequate warning was an indispensable prerequisite for the damage limit and gave the passenger an opportunity to take self-protective measures. With the warning, the passenger could purchase insurance, decline flight or make a "special contract" with the carrier for "a higher limit of liability". Article 22.[10]

Under the decision below, an airline would benefit from the damage limit simply by delivering to its passenger a piece of paper bearing the single word "ticket" or by including a warning in Lilliputian size print. It is fundamental, however, that a treaty, whether construed literally or liberally, should be interpreted to effectuate its evident purposes. *Air France v. Saks*, 470 U.S. 392, 399 (1985); *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940); *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933); Restatement of Foreign Relations Law § 147 ("International law requires that the interpretative process ascertain and

10 The special contract provision was included in the original 1925 draft of the Convention as a means for the carrier to make insurance available to the passenger. See Point IV, *infra* at 30.

give effect to the purpose of the international agreement . . .''). As this Court has held in interpreting the Warsaw Convention, "it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399 (1985). Delivery of a ticket without an adequate warning was required by the Treaty's language and history to deny the limitation to the airline. Such a ticket fails to give the passenger an opportunity prior to boarding to take appropriate action.

In *Lisi v. Alitalia*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968), a ticket was delivered with the warning statement in small size print (4 point type). An equally divided Court[11] affirmed the Second Circuit's holding that the "Lilliputian" and "virtually invisible" notice was the equivalent of no notice. *Id.* at 514. The circuit ruled that to allow the airline to deliver such a notice and claim the limitation would render the Treaty's terms meaningless:

> The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. *Id.* at 512-513.

The United States government supported the Second Circuit's holding by stating that *Lisi* accorded "purpose and meaning" to Article 3. Memorandum for *Amicus*

11 Justice Marshall did not participate in the Court's decision, apparently because he filed an *amicus* brief in *Lisi* as Solicitor General. Memorandum for *Amicus* United States (jurisdictional stage), *Lisi v. Alitalia*, 390 U.S. 455 (1968).

United States (jurisdictional stage) at 7, *Lisi v. Alitalia*, 390 U.S. 455 (1968).[12]

Lisi was preceded by *Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965) and *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir. 1965). In *Warren*, the airline was denied the limitation where passengers were given tickets at the foot of the ramp leading onto the plane:

> None of the passengers were afforded a reasonable opportunity of even reading the ticket, much less obtaining additional insurance, before they were accepted by boarding the plane. The passengers were thereby deprived of a right which was intended to be afforded them as a concomitant to the carrier's right to limit its liability. 352 F.2d at 498.

The Ninth Circuit further observed that a magnifying glass was needed to read the ticket's fine print. 352 F.2d at 497.[13] In *Mertens*, 341 F.2d 851 (2d Cir. 1965), the ticket was delivered to the passenger on the aircraft shortly before take-off. The court held that the airline failed to comply with its Warsaw obligations and lost the benefit of the limitation:

12 With the sole exception of the decision below, *Lisi* has been cited with approval and applied by various United States courts, including the Court of Appeals for the District of Columbia. *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 917 (D.C.Cir. 1973); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1198 n. 11 (3rd Cir. 1978); *Block v. Compagnie Air France*, 386 F.2d 323, 325 n. 2 & 334 n. 32 (5th Cir. 1967).

13 Similarly, in *Manion v. Pan American World Airways*, 55 N.Y.2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982), the highest court of New York State held the limitation inapplicable where the airline did not deliver a ticket until after the passenger completed the first leg of her trip.

> We read Article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. . . . The delivery requirement of Article 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air. 341 F.2d at 856-857.

The court also based its conclusion that the limitation was inapplicable on the fact that "the statement concerning the limitation of liability was printed in such a manner as to virtually be both unnoticeable and unreadable . . ." *Ibid.*

Following *Lisi*, the New York State Court of Appeals unanimously held that delivery of a small print notice (in 4.5 point type) violated Article 3 as a matter of law and resulted in liability for full damages. *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968). The court found that "[i]n our judgment, a statement which cannot reasonably be deciphered fails of its purpose and function of affording notice and may not be accepted as the sort of statement contemplated or required by the Convention." 21 N.Y.2d at 169, 234 N.E.2d at 202, 287 N.Y.S.2d at 19-20.

Lisi, *Warren*, *Mertens* and *Egan* all involved air crashes occurring before the airlines signed the Montreal Agreement which mandated the form and minimum size of the Article 3 warning statement.

II

HAVING INDUCED THE UNITED STATES TO CANCEL ITS WITHDRAWAL FROM THE TREATY IN EXCHANGE FOR THE MONTREAL AGREEMENT, AIRLINES WERE REQUIRED TO WARN PASSENGERS OF THE DAMAGE LIMIT IN THE SPECIFIED MANNER TO INVOKE THE LIMIT

In November 1965, dissatisfaction with the Warsaw damage limit caused the United States to take the extraordinary step of formally denouncing the Treaty. *Trans World Airlines v. Franklin Mint*, 466 U.S. 243, 252 & n. 22 (1984). Pursuant to Article 39, the withdrawal would take effect six months later. Thereafter, airlines would be liable in the same manner as any tortfeasor for the actual damages caused by negligence.

The justification claimed for the Warsaw limitation three decades earlier was no longer persuasive. Commercial aviation had matured from an uncertain venture into a reliable industry for which insurance was readily available to cover any risk. Lowenfeld, 80 Harv. L. Rev. at 498 & n.3, 566-7. As a corollary to the status achieved by the industry, by the 1960's passengers were "likely to undertake international travel quite casually and without realizing the drastically limited protection . . . compared to that provided by domestic flights." *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 171, 234 N.E.2d 199, 204, 287 N.Y.S.2d 14, 21 (1967), *cert. denied*, 390 U.S. 1039 (1968). A series of highly publicized air crashes in which

recoveries were limited to $8,300 galvanized opposition to the Convention.[14]

International airlines were understandably eager to continue the limited liability regime. Efforts to persuade the United States to accept the Hague Protocol of 1955 with its $16,600 damage limit were unavailing. Lowenfeld, 80 Harv. L. Rev. at 515, 541-546.

Under those circumstances, there was insufficient time to prepare a formal treaty before the United States denunciation became effective. *Id.* at 550. Instead, in May 1966, airline representatives from around the world met in Montreal and drafted the Montreal Agreement to induce the United States to cancel its withdrawal from the Treaty. *Id.* at 588-596.

The United States formally accepted the Agreement by an Executive Order and withdrew its denunciation two days before the effective date. 31 Fed. Reg. 7302 (1966), *reprinted in* 28 U.S.C.A. § 1502 note; Lowenfeld, 80 Harv. L. Rev. at 596.

Our government understood that the Agreement was an "interim arrangement" for several years during which a new treaty would be prepared to either increase the $75,000 limit or abandon any damage limit. Lowenfeld,

---

14 For instance, singer Jane Froman was seriously injured on a flight to Europe for the U.S.O. and despite extensive injuries and medical bills, her damages were limited to $8,300. *Ross v. Pan American World Airways*, 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert. denied*, 349 U.S. 947 (1955). In the early 1960's, damages were limited to $8,300 for international flights carrying the United States Ice Skating Team and the Atlanta Art Association which crashed, killing all aboard. *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Kelley v. Societe Anonyme Belge d'Exploitation*, 242 F.Supp. 129 (E.D.N.Y. 1965).

80 Harv. L. Rev. at 602.[15] Based upon the then "available statistics . . . a 75,000 dollar limit per person looks reasonable at this time." *Id.* at 601. Over twenty years have passed, but the "interim" limit remains in effect.[16]

The Agreement applies only to transportation having a place of origin, destination or stopping place in the United States. Thus, the principal beneficiaries are residents of this country where damage recoveries are higher than in other nations.

---

15 The State Department press release issued on the day the Notice of Denunciation was filed provided:

> The United States would be prepared to withdraw the notice of denunciation deposited today if prior to its effective date of May 15, 1966, there is a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of $100,000 per passenger or on uniform rules but without any limit of liability, and if, pending the effectiveness of such international agreement, there is a provisional agreement among the principal international airlines waiving the limits of liability up to $75,000 each passenger.

50 Dep't State Bull. 923 (1965). (JA 279). The United States continued as a party to the Treaty not because the damage limitation was needed, but rather to promote international cooperation by uniform transportation rules. Lowenfeld, 80 Harv. L. Rev. at 564 ("While the principle of limited liability had no particular appeal, the maintenance of an international treaty system did.").

16 At the time the Agreement's damage limit was set in 1966, the most current statistics (from 1958 through 1964) showed that the average wrongful death recovery in non-Warsaw aviation accidents was $52,000. Lowenfeld, 80 Harv. L. Rev. at 553. A recent study of the Rand Corp. showed that by the early 1980's, the average wrongful death recovery in airline air crashes increased to about $500,000. National L. J., May 23, 1988, p. 1 (App 100-101). The Rand study found that between 1970 and 1984, the same average was $362,943. *Ibid.*

The Agreement contains the three essential terms demanded by the United States for its continued participation in the limited liability regime: increase of the Warsaw limit to $75,000; waiver of the complete defense available to the carrier under Article 20(1) (that "all necessary measures" were taken to avoid the accident) thus creating no fault liability; and issuance by airlines of a ticket to each passenger containing a uniform Article 3 notice in a minimum 10 point type size print. (App 8, JA 21-23).

To bind the airlines, the Montreal Agreement was framed as a "special contract" under Article 22(1) of the Warsaw Treaty and each carrier was obligated to sign and file the contract with the Civil Aeronautics Board. Lowenfeld, 80 Harv. L. Rev. at 593. As such a contract, the Agreement "incorporates all other provisions of the Convention." *Id.* at 597.

All foreign airlines must sign the Agreement as a condition of their Foreign Air Carrier Permit which allows the conduct of business in the United States. 14 C.F.R. Section 213.7 (App 13). KAL signed the Agreement in 1969 and received a permit. (JA 19, 21, 24).

By the Montreal Agreement, most airlines, including KAL, became contractually bound to the longstanding United States policy: for the unusual Warsaw limitation to apply, the passenger must receive the Article 3 warning in large print. At the Hague Conference in 1955, the American delegate proposed that Article 3 be amended to require a ticket warning measuring at least one half centimeter high—larger than 10 point type. International Conference on Private Air Law, The Hague, 1955, Vol. I, p. 124 (JA 215); Lowenfeld, 80 Harv. L. Rev. at 514.

Montreal's minimum 10 point type requirement in 1966 replicated a 1963 Civil Aeronautics Board regulation. It remains in effect today and continuously required the Article 3 statement be printed in at least 10 point type. 14 C.F.R. § 221.175(a) (App 11).

In proposing the regulation, the CAB foreshadowed the decision a few years later in *Lisi*, observing that the notice then provided by air carriers pursuant to Article 3 "may be inadequate" and that the "type in which the notice is currently printed is too small to alert the passengers to the importance of the matter." 66 Fed. Reg. 3281 (1963); *see* Lowenfeld, 80 Harv. L. Rev. at 512 ("Even if the passenger could read the ticket, he would hunt in vain for warning of the liability limit."). The Board noted that many passengers were unaware of the limitation and the need to obtain insurance. 66 Fed. Reg. 3281 (1963).

The 10 point type requirement was an Executive Branch determination of minimum notice to the passenger. The CAB observed that "[l]esser notice does not suffice to give adequate notice appropriate in the public interest". Memorandum for *Amicus* Civil Aeronautics Board (merits stage) at 9, *Lisi v. Alitalia*, 390 U.S. 455 (1968) (JA 305).

The CAB continued the Treaty's link between the warning and the damage ceiling by imposing the regulation on each "air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention." 14 C.F.R. § 221.175(a) (App 11).

III

KAL IS LIABLE FOR ACTUAL DAMAGES WITHOUT ARBITRARY LIMIT BECAUSE IT FAILED TO ADEQUATELY WARN THE PASSENGERS OF THAT LIMIT

Warsaw's Article 3 required KAL to adequately warn its passengers of the damage limit in order to obtain the *quid pro quo* of that limit. KAL's failure to do so should deny it that benefit. Point I, *supra* at 8.

By virtue of the Montreal Agreement, CAB regulation and the foreign air carrier permit, KAL was obligated to warn passengers of the damage limit with the prescribed minimum size print in order to benefit from the limit. KAL's failure to do so should deny it that benefit. Point II, *supra* at 15.

In *Polish Airlines*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983), the airline delivered an Article 3 warning to its passengers in small 8.5 point type, violating its Agreement, permit and the regulation. Based on an exhaustive review of the history of the Convention and the Montreal Agreement, the Second Circuit held that Article 3 denied the carrier the limit. *Id.* at 91.

The Fifth Circuit recently reached the same conclusion where the airline delivered a 9 point type warning. *Pan American Airways*, 789 F.2d 1092, 1098 (5th Cir.), *reh'g granted*, 795 F.2d 381 (5th Cir. 1986), *reinstated*, 821 F.2d 1147, 1171 (5th Cir. 1987) (*en banc*), *petition for cert. filed sub nom., Pan American World Airways v. Lopez*, 55 U.S.L.W. 3369 (U.S. Nov. 6, 1987) (No. 87-750).

The decision below granted KAL the limitation despite warnings printed in only 8 point type (JA 12-14, 19, 28-119, 388), smaller than the notices in *Polish Airlines* and *Pan American Airways*.

The only decision cited favorably by the district court below on the ticket issue was a Canadian Supreme Court case. *Ludecke v. Canadian Pacific Airlines*, 98 D.L.R.3d 52 (Can. 1979). But it did not involve a ticket with a stopping place in the United States and, therefore, was not governed by the 10 point requirement imposed by the Agreement and our federal regulation. *Ludecke* did not discuss the drafting history of the Convention and is directly contrary to that history (Point IV, *infra* at 36-37) and the uniform decisions of American courts.

A. The Agreement and regulation have the force of law and implement the Treaty

Warsaw expressly allows supplemental contracts. Article 22(1). The only contracts barred by the Convention are those which "relieve the carrier of liability or fix a lower limit." Article 23. The Treaty's drafters contemplated that the ticket contract would contain additional terms. The Convention's reporter observed that "[n]othing prevents the two parties from making special contracts". Second International Conference on Private Aeronautical Law, Minutes, Warsaw, 1929, p. 160 (R. Horner & D. Legrez trans. 1975) (JA 158). Thus, the Montreal Agreement was authorized by the Warsaw Treaty.

By both the Treaty and federal law, the Executive Branch was authorized to require through approval of the Montreal Agreement and the CAB regulation that airlines deliver the Article 3 notice in a minimum print size. 49 U.S.C. §§ 1302, 1324(a), 1382, 1502; *Trans World Airlines v. Franklin Mint*, 466 U.S. 243 (1984); *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973).

In *Trans World Airlines v. Franklin Mint*, 466 U.S. 243 (1984), this Court recently upheld another Civil Aeronau-

tics Board regulation which converted the Warsaw's damage limit, expressed in French gold francs into United States dollars:

> The $9.07 per-pound limit . . . represented an Executive Branch determination, made pursuant to properly delegated authority, of the appropriate rate for converting the Convention's liability limits into United States dollars. *We are bound to uphold that determination unless we find it to be contrary to law established by domestic legislation or by the Convention itself. Id.* at 254 (emphasis added).

By the same reasoning, the 10 point type requirement of the Montreal Agreement approved by our government and its federal regulation constituted an Executive Branch determination, pursuant to properly delegated authority, which should be upheld as consonant with the Treaty and federal law.

The print size standard represented the benchmark for which the Executive Branch concluded that lesser notice was insufficient to properly warn passengers. That standard is not unreasonable. Approval by the airlines, including KAL, of the Agreement reinforces this conclusion. As the Second Circuit observed in *Polish Airlines*, "Withdrawal of the Denunciation and the CAB's acceptance of the Montreal Agreement indicates a judgment by at least the executive branch that 10-point type was necessary to provide sufficient notice, and we see no reason to dispute that determination." 705 F.2d at 90.

The Montreal Agreement established a separate liability regime (liability-damages-warnings) for international flights involving the United States. Lowenfeld, 80 Harv. L. Rev. at 596-601. The provisions of the Convention

authorized varying implementation by its member nations. One example is the special contract allowed by Article 22. Another is the CAB interpretation of the Convention's damage limit upheld by this Court and which had been adopted by only one other Warsaw signatory. *Trans World Airlines v. Franklin Mint*, 466 U.S. 243, 257 n.31 (1984). And a third is the 10 point type regulation. It was challenged in *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973), by the German national airline as contrary to the Convention and the CAB's authority. But the circuit rejected those arguments and ruled that "the provisions of Article 3 may be supplemented by additional regulations" and the 10 point standard "not only does not contradict the provisions of the Warsaw Convention *but actually gives [Article] 3(1)(e) substantive effect*." *Id.* at 916, 918 (emphasis added).

Contrary to the decision below, the same circuit court in *Deutsche Lufthansa* adopted *Lisi v. Alitalia* and stated that the airline's failure to deliver the required warning would result in loss of the damage limit:

> Compliance with the [10 point type] regulation will not only provide passengers with adequate notice of the limitations on liability imposed on them but will later enable the carrier to invoke the protection of [Article] 3(1)(e), for unless adequate notice is accorded its passengers, the carrier will later be precluded from using the Convention to limit liability. *Id.* at 918.

B. Having failed to provide the Article 3 warning in 10 point type print, KAL may not assert the damage limit.

For fourteen years before this catastrophe, KAL stipulated that 10 point type was the minimum required by Article 3. After the catastrophe, KAL should be denied a finding that smaller type constitutes adequate notice.

The airlines, not the passengers, incorporated the 10 point minimum warning into the Montreal Agreement. The United States was induced by the airlines to withdraw its denunciation and continue the limited liability regime. If the Agreement had not been signed, "there would in all probability be no Convention today", *Polish Airlines*, 705 F.2d at 91. And then KAL would be liable for actual damages, not limited to $75,000.

Compliance with the Agreement, an obligation facilely fulfilled by almost all international airlines since 1966, would invoke the limit. Conversely, receipt of the proper warning would bar a claim of its inadequacy to escape the limit. *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 918 (D.C. Cir. 1973). The American delegate to the Hague Convention recognized that waiver of the limit for failure to deliver the specified statement was appropriate since it is "so easy for carriers to comply with the notice requirement". International Conference on Private Air Law, The Hague, 1955, Vol. I, p. 128 (JA 221); Brief for United States at 13, *Pan American World Airways v. Lopez*, 55 U.S.L.W. 3369 (U.S. Nov. 6, 1987) (No. 87-750) ("one might expect that the problem is easily eliminated by the consistent use of ten-point type").

The sole purpose of the 10 point warning was to benefit passengers. Certainly, the Warsaw/Montreal warnings are less than ideal. But they are a compromise balancing the need to warn passengers of the anomalous damage ceiling against the inconvenience to airlines in providing

notice.[17] KAL agreed to that need. By denying passengers their benefit, KAL should be denied the related benefit of the damage limit.

The minimum 10 point type standard is no more arbitrary than the $75,000 limit it preserves. In the same vein, the Second Circuit observed in *Polish Airlines*:

> The 10-point guideline is a clear one, and quite easy to follow. To be sure, any such line drawing has an arbitrary air, but [the airline] is a party to the line drawn and it seems to us less arbitrary to accept the 10-point standard than it would be to guess on a case-by-case basis at what constitutes "adequate notice". 705 F.2d at 90 n. 10

Pan American Airways, 789 F.2d at 1098 ("10-point type means exactly that, 10-point type").

To allow an airline to deliver a sub-minimum warning and invoke the limit would nullify the requirement. Indeed, airlines would then receive the limit in the absence of any warning.

The Agreement should have ended all litigation concerning the required Warsaw warning. In 1967, the Solicitor General as an *amicus* in *Lisi* stated that by the Montreal Agreement "the airlines . . . obligated themselves to provide additional '*notice in 10 point type* advising international passengers of the limitations of liability' " and that "[t]he inclusion of that new notice . . . would remedy the inadequacy in notice found by the courts below." Memorandum for *Amicus* United States (jurisdictional stage) at 9, *Lisi v. Alitalia*, 390 U.S. 455 (1968) (emphasis in original).

---

17 The framers of the Warsaw Convention expressly rejected a requirement that the passenger prove that his harm was caused by a defective ticket. Point IV, *infra* at 32.

Rather than barring the damage limit, the court below found that a "more appropriate sanction" would be to deny the airline its landing privileges in the United States. (JA 413). Whether that is an appropriate governmental sanction, it is not a reasonable substitute for the fair compensation required by the Treaty and the Agreement when the airline breaches its obligation to adequately warn.

C. KAL's admitted breach of the contract results in loss of the damage limit.

Wholly apart from the requirements of Article 3, loss of the damage limit results from KAL's breach of contract, the Montreal Agreement.

The court below found that KAL's breach of contract was of no consequence in these actions. But after KAL deprived its passengers of their contractual benefit and then culpably contributed to their deaths, only one consequence is equitable and legally sound: KAL should not benefit from its breach by receiving the damage limit.

It is hornbook law that a material breach of contract is cause for equitable relief, including rescission, to restore the parties to the *status quo*. 12 *Williston on Contracts*, § 1455, § 1457, p. 14, 42 (3rd ed. 1970). Breach of the subject contract—the Montreal Agreement—properly results in loss of the damage ceiling. If the United States did not cancel its withdrawal from the Treaty, no limit would exist. By agreeing to the Montreal contract, the airlines induced the United States to continue as a Treaty party and benefit the airlines with a limit.

Adequate warning of the damage limit was a material part of the Montreal contract. The United States repeatedly expressed its dissatisfaction with *any* damage ceiling and demanded in return for one that the airlines agree to warn passengers by the specified notice. Point II, *supra* at

15. Thus, KAL's breach of contract warrants denial of the damage limit benefit to KAL. Recovery of actual damages is the only appropriate equitable relief to restore the *status quo*.

Polish Airlines' rationale is correct: "Passengers were clearly the intended beneficiaries of a contract which specified, inter alia, the notice carriers had to provide if they were to receive the benefit of a limitation of liability." 705 F.2d at 91. The purpose of the 10 point type requirement was to give passengers adequate warning of the limit prior to boarding. That benefit to passengers was thwarted by KAL. It should not benefit from the damage limit after culpably contributing to the deaths of its passengers.

Acceptance of the contract's terms was a condition precedent to the issuance of a foreign air carrier permit which allowed KAL to conduct its business, including the subject flight, in the United States. KAL "cannot now be heard to say that it should not be bound by the 10 point type size requirement." *Polish Airlines*, 705 F.2d at 90.

KAL can hardly claim surprise that its breach of contract would result in loss of the damage limit. That consequence was foreseeable after the 1968 decision by this Court in *Lisi v. Alitalia*. In the following year, KAL signed the contract and became bound by the CAB regulation. It was approved in 1973 by the District of Columbia Circuit in the *Deutsche Lufthansa* case. That court specifically warned airlines that the damage limit would be lost by a notice smaller than the minimum 10 point type size. Many years later and eighteen months before this catastrophe, the district court decided *Polish Airlines*, 535 F.Supp. 833 (E.D.N.Y. 1982).

This long history of strong and repeated warnings to KAL equitably dictate the loss of the damage limit by

KAL's breach of its contract. KAL chose to accept the risk of liability for full damages. And now KAL should bear the damage consequences of its misconduct.

The decision below declared that *Polish Airlines* "abrogated" the Treaty and defined the limitation "out of existence". (JA 415, 416). To the contrary, by allowing KAL to shirk its responsibility to fairly warn and then receive the limit, the court below ignored the language and history of the Convention. Affirmance of that decision would deny passengers adequate warning and allow airlines to violate federal regulation, breach their contract and benefit from the damage limit by giving inadequate warning or no warning at all. Such a result would be bizarre.

IV

THE HISTORY OF THE TREATY DEMONSTRATES THAT THE WARNING WAS A PREREQUISITE FOR THE LIMITATION

The language of Article 3 provided that unless the carrier delivered a passenger ticket with the specified statement, it lost the damage limit. The Convention's history reinforces that language. The drafters intended to alert passengers to the need for insurance and deny the limit to a carrier which delivered a ticket without proper notice. Developments subsequent to the Convention's adoption are corroborative.

A. The Paris Conference of 1925

The drafting of the Warsaw Convention began at the First International Conference on Private Air Law held in Paris in 1925. *See Air France v. Saks*, 470 U.S. 392, 401 (1985).

From the outset, when the initial draft consisted only of a few core provisions, a warning "statement" was required in the passenger ticket. The draft provided:

> The travel-ticket and way-bill shall mention in particular:
>
> * * *
>
> Indication of the legal limit of responsibility and, should the case arise, of the supplemental guarantee given of the carrier, according to Article 7. Conference Internationale de Droite Prive Aerien (Paris 1926), p. 78 (App 29 translated at App 65).[18]

---

18 The 1925 draft uses the same French word "indication" for the warning as subparagraph (e) of the final Convention. In 1926, the State Department translated the French "indication"

That provision fulfilled the drafters' intent that passengers should be put on an "equal footing" with the carrier and informed of the Convention's damage limitation. *Id.* at 56, 78 (App 23, 29 translated at App 58, 65).

In *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), the court stated that the obligation to deliver a passenger ticket with notice carried out "the Conference goal that the rules of limited liability be known to both parties". *Id.* at 333-334.

The first draft obliged carriers to make insurance coverage above the limit available to each passenger prior to boarding. That coverage could be purchased by entering a "special agreement" with the carrier for a higher limit of liability. Conference Internationale de Droite Prive Aerien (Paris 1926), p. 56, 79 (App 23, 29-30 translated at App 58, 65-66). Indeed, Article 22(1) of the final Convention eventually allowed for a "special contract" to increase the damage limit.

The final Convention omitted any obligation for the carrier to make insurance available thereby leaving passengers to obtain insurance from others.

B. The CITEJA Draft

The final draft of the Convention was prepared by the International Technical Committee of Legal Aeronautical Experts (known as CITEJA) as a result of meetings in April 1927 and May 1928.

The CITEJA draft manifested the intent that unless a warning was provided to the passenger, the carrier could not assert the damage limitation. Comite International

---

into English as "indication", but the same word in the official French Convention was later translated as "statement".

Technique D'Experts Juridiques Aeriens, Compte Rendu Provisoire (Third Session, May 1928), p. 25 (App 45-46 translated at App 78-79); Report of Henri DeVos, CITEJA Reporter (September 1928), *translated and reprinted in* Second International Conference on Private Aeronautical Law, p. 247 (R. Horner & D. Legrez trans. 1975) (JA 86).

The draft of Article 3 listed only four "particulars", (a) through (d), for the passenger ticket. They were essentially the same as particulars (a) through (d) in the final Convention: the date and place of issue; the points of departure and destination; the stopping places; and the carrier's name and address. These particulars were personal to each passenger. The notice requirement, however, was *not* listed as a particular in the CITEJA draft. Instead, a separate paragraph provided that the "passenger ticket shall contain, moreover, a clause stipulating that the carriage is subject to the system of liability set forth by the present Convention." Preliminary Draft of the Convention, CITEJA (May 1928), *translated and reprinted in* Second International Conference on Private Aeronautical Law, p. 258 (R. Horner & D. Legrez trans. 1975) (JA 182).

The four particulars were of substantive significance. Warsaw applies only to international transportation and the presence of such transportation is determined by the place of departure and destination "according to the contract made by the parties". Article 1. Thus, Article 3 mandated that those places be listed as particulars on the ticket. Suit may be brought under Article 28 at the place where the contract was made or the carrier's domicile. They are also particulars required by Article 3.

That CITEJA draft then provided for the "sanction"—loss of the damage limit—"[i]f, for international carriage,

the carrier accepts the traveler without having drawn up a passenger ticket, or if the ticket does not contain the particulars indicated hereabove . . ." *Ibid.* (JA 183).

At the 1928 CITEJA conference, the Greek delegate argued that loss of the limit should not be triggered by failure to include one of the particulars, unless it caused damage to the passenger. Comite International Technique D'Experts Juridiques Aeriens, Compte Rendu Provisoire, p. 25 (Third Session, May 1928) (App 44-46 translated at App 78-79).

The Greek proposal was rejected.[19] The Swiss delegate stated that "the Convention must defend itself" and that "if there is omission of one of the required statements, then there is a professional fault and it must involve a sanction". *Ibid.* The CITEJA reporter agreed:

> The Reporter adds that, as just indicated by Mr. Pittard [the Swiss delegate], long prior discussions have led to the text now being proposed; the only practical sanction which has been found is one deriving from the Agreement itself. These omissions which Mr. Youpis [the Greek delegate] considers as slight are not so in fact: All that is indicated as mandatory statements is highly important. *Ibid.*

The reporter further stated that loss of the limit for failure to deliver the specified ticket was an "essential provision". *Ibid.* He observed that CITEJA dismissed proposals which required the passenger to prove that a ticket omission caused injury or that a criminal, rather than a civil sanction should be imposed. *Ibid.*

---

19 A similar proposal relating to the air waybill made by the same delegate at the 1927 CITEJA conference was also rejected. Comite International Technique D'Experts Juridiques Aeriens, Compte Rendu, p. 37 (Second Session, April 1927) (App 39 translated at App 74).

C. The Warsaw proceedings of 1929

At the Warsaw Convention, each delegation was asked to submit proposed amendments based on the CITEJA draft. No proposals were made to omit the requirement for delivery of the warning statement as a prerequisite for the damage limit. Second International Conference on Private Aeronautical Law, pp. 269-324 (R. Horner & D. Legrez trans. 1975) (JA 197).

The Greek delegate renewed his proposal that a carrier should not lose the limitation where a clerk made a simple error in filling out the ticket rubrics and the passenger suffered no harm. Second International Conference on Private Aeronautical Law, pp. 303-304 (R. Horner & D. Legrez trans. 1975) (App 92-93). The delegate observed that in most cases the carrier and the passenger would be aware of the travel arrangements, and, for example, the omission of a stopping place would not be of great importance. He suggested that whether the omission of an item resulted in loss of the limitation should be decided on a case-by-case basis by courts. *Ibid.*

The Greek proposal did not involve the warning statement. It would be printed by the carrier on every ticket. The statement could not involve a "simple error" by an employee in completing the information personal to each passenger. At the time of the proposal and during the Convention discussion, the requirement for a warning statement continued to appear in an independent paragraph, *not* one of the four particulars. *Ibid.*[20]

---

20 The reporter told the delegates:

> "It's the same text as the draft; there is only the elimination at letter (c) . . . [and] at the last paragraph, elimination of "or if the ticket does not contain the particulars indicated above". *Ibid.*

The Greek proposal was addressed to the Convention during review of Polish proposals to add the passenger's name and address as another particular in a new subparagraph (e). *Id.* at 150 (JA 147-148). The reporter stated:

> These proposals [to add the name and address of the passenger as a particular] were rejected, not that they will not or would not appear on the passengers ticket—in fact, these headings are found thereon. But in the face of an observation of the Greek Delegate, which is as follows—The last paragraph of the article provides for sanctions in the case of the absence of this passenger ticket, or when the passenger ticket does not contain all the particulars indicated, consequently the sanction is too severe when it's a question of a simple omission, of the negligence of an employee of the carrier—the committee allied to this point of view and, in the last paragraph, it eliminated the words: ". . . or if the ticket does not contain the particulars indicated above".
>
> *But the consequence was that it was necessary to be much more severe for particulars imposed on the passenger ticket, and we have retained only the indispensable minimum to be able to consider the carriage as international carriage in the meaning of the Convention. Ibid.* (Emphasis added).

These discussions show that the drafters intended the four particulars to be "indispensable" prerequisites for invoking the limitation. Once again, the reference to a "simple omission" from the ticket was unrelated to the required warning.

The Japanese delegation proposed that the wording of Articles 3 and 4 be clarified to show the drafters' intent that "*the particular of the clause concerning the liability of the carrier is compulsory*". *Id.* at 310 (emphasis added)

(App 93). That proposal was addressed during the discussion of Article 4. *Id.* at 156 (JA 154). The warning statement required for the baggage check was changed from a separate paragraph into subparagraph (h) as another particular. Subsequently, without recorded discussion, the same warning statement in Article 3 was also changed from a separate paragraph into subparagraph (e) as a fifth particular. *Id.* at 195 (App 82-83).

KAL argued below that the limitation was not lost since Article 3 did not contain the express language similar to Article 4 (baggage check) or Article 9 (air waybill) that certain particulars were compulsory. But the drafting history establishes that the framers consistently intended that in order for the damage limit to apply, the warning statement must be made. It was the sole invariable requirement for limiting damages.

The drafters never intended to give less protection to passengers for damages for death than baggage or goods. Had the drafters intended to break the link binding the statement to the limitation, such an intent would have been clearly expressed because linkage had consistently been declared to be essential. The baggage ticket and waybill both link the warning statement to loss of the limitation. The same is obviously true for the passenger ticket.

One year before the United States adhered to the Convention, a commentator wrote that the limitation was lost by omission of any of the particulars listed in Article 3. Y.J. Blanc-Dannery, *Convention de Varsovie* (Paris 1933), p. 28 (App 96-97 translated at App 99); *see Stratis v. Eastern Airlines*, 682 F.2d 406, 411 n. 7 (2d Cir. 1982) ("Why would the treaty writers give less protection to passengers than to baggage or goods? Were not the particular provisions of Article 4(4) and 9 merely a narrowing of the carrier's liability rather than an indication that the treaty-

writers intended to treat passenger tickets as mere formalities except when they omit reference to the limitation provisions?'').

When Article 4 was considered, the drafters indicated that they retained the same sanctions as Article 3, but limited them to only three items, one of which was the required statement:

> On the subject of compulsory particulars, the committee decided to reduce these to a strict minimum . . . The last paragraph was not modified like Article 3; that is to say that *we have retained the same sanctions in the case of errors in the particulars, however, only letters (d), (f) and (h) are now compulsory particulars*. Second International Conference on Private Aeronautical Law, p. 156 (R. Horner & D. Legrez trans. 1975) (emphasis added) (JA 154).

Article 3 establishes a limitation founded on delivery of a meaningful passenger ticket. Since Article 22 provides the carrier and passenger may agree to a special contract to increase the damage ceiling, this provision would lack significance unless the passenger received a warning of the existence of the limit. *Mertens v. Flying Tiger Line*, 341 F.2d 851, 857 (2d Cir. 1965) (''there would be little reason'' for Article 22 ''unless the Convention also required that the ticket be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures.'').

The only case favorably cited by the court below, *Ludecke v. Canadian Pacific Airlines*, 98 D.L.R.3d 52 (Can. 1979), was by a Canadian court which did not address the Convention's history and one important provision. As a result, the case mistakenly construed the language of Article 3(2) which provides that the ''absence, irregularity or loss of the passenger ticket shall not effect

the existence or the [illegible]idity of the contract of transportation''. *Ludecke* held that this provision allowed airlines to deliver an ''irregular'' ticket without a warning statement and benefit from the damage limit. But Warsaw's language and history establish the contrary. *Ludecke* relied on the first sentence of Article 3(2) which provides that the Convention applies to a passenger who receives an irregular ticket. *Ludecke* failed, however, to give effect to the history and language of the next sentence which linked the loss of the damage limitation to the mandatory warning statement specified by Article 3(1).

D. The Hague Convention of 1955

The 1955 Hague Protocol amended Article 3 of the Warsaw Convention to add a provision that an airline's failure to deliver the warning statement resulted in loss of the damage limit. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955, 478 U.N.T.S. 371 (JA 252-255). The Hague delegates openly discussed whether the amendment was necessary because the Convention already contained the same provision. International Conference on Private Air Law, The Hague, 1955, Vol. I, p. 125 (JA 216-217).

Alan Goodfellow, representing the International Union of Aviation Insurers, argued that no amendment was needed. He said that in the case of a ''bad carrier'' which issued a ticket purporting to relieve the airline of liability, the Convention already deprived the carrier of the limitation:

> [I]n such a case, a Court would state it was quite clear that the object of Article 3(2) was to ensure that the carrier should deliver a ticket, not necessarily in the precise form laid down by Article 3(1), but giving the

> appropriate information to the passenger to show whether the Convention applied or not, to show against whom the claimant had a right of action, and, generally, to put the claimant in a position to judge his rights and to exercise them. The Court would find that the carrier in this case had completely disregarded his obligations under the Convention and had attempted to evade them. *The Court would hold that this was a clear breach of Article 3 and that the carrier was liable without limit. Ibid.* (emphasis added).

The United States delegation argued successfully at the Hague Conference to maintain the warning statement as a *quid pro quo* of the limitation. *Id.* at 126 (JA 220-221).

Subsequently, the Hague Protocol was rejected by the United States, primarily because its damage limitation of $16,600 was inadequate. *Reed v. Wiser*, 555 F.2d 1079, 1086 (2d Cir. 1977); Lowenfeld, 80 Harv. L. Rev. at 532.

E. The United States position

The United States had an observer present at the Warsaw Convention, but did not participate in drafting the Treaty. Our government, however, has repeatedly expressed its understanding that Article 3 of the Convention requires delivery of the warning statement as a condition of the damage limitation. Memorandum for *Amicus* United States (jurisdictional stage) at 7, *Lisi v. Alitalia*, 390 U.S. 455 (1968); Brief for United States at 12-13, *Pan American World Airways v. Lopez*, 55 U.S.L.W. 3369 (U.S. Nov. 6, 1987) (No. 87-750), supporting grant of certiorari and reversal of the court below in *Chan v. Korean Air Lines*, the actions at bar.

The United States successfully defended the 10 point standard against attack by the airlines. *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973); Brief for United States at 13, *Pan American World Airways v. Lopez*, 55 U.S.L.W. 3369, (U.S. Nov. 6, 1987) (No. 87-750).

United States appellate courts have uniformly supported the United States position for decades until the decision below. It, for the first time, severed the link between the warning and the damage limit.

CONCLUSION

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed and remanded with a direction to grant the plaintiffs' motion for partial summary judgment declaring KAL liable for their actual damages not limited to $75,000.

Respectfully submitted,

MILTON G. SINCOFF
Counsel of Record
STEVEN R. POUNIAN
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181

DONALD W. MADOLE
SPEISER, KRAUSE & MADOLE
1216 16th Street, N.W.
Washington, D.C. 20036
(202) 223-8501

Attorneys for Petitioners
Elisa Chan, et al. and
Plaintiffs' Steering
Committee

On the Brief:

MILTON G. SINCOFF
STEVEN R. POUNIAN

APPENDIX

INDEX TO APPENDIX

PAGE

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. § 1502 note (Warsaw Convention) (relevant excerpts) A-1

Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900, Approved by Executive Order E-23680, May 13, 1966 (Docket 17325), (1966), reprinted in Civil Aeronautics Board, Aeronautical Statutes and Related Material 515-16 (1974) (Montreal Agreement) A-8

Federal Aviation Regulation, 14 C.F.R. § 221.175(a)... A-11

Federal Aviation Regulation, 14 C.F.R. § 213.7 ..... A-13

Conference Internationale de Droite Prive Aerien (Paris 1926) (relevant excerpts) A-14

Comite International Technique D'Experts Juridiques Aeriens, Compte Rendu Provisoire (Second Session, April 1927) (relevant excerpts)..... A-33

Comite International Technique D'Experts Juridiques Aeriens, Compte Rendu Provisoire (Third Session, May 1928) (relevant excerpts) A-41

Certificate of Accuracy of petitioners' translations..... A-48

International Conference On Private Aviation Law (Paris 1926) (petitioners' translation of relevant excerpts)..... A-49

PAGE

International Conference On Private Aviation Law (Paris 1926) (State Department translation of draft agreement) A-63

International Technical Committee Of Legal Aviation Experts (CITEJA), Report on the 2nd Session, April, 1927 (petitioners' translation of relevant excerpts) ... A-68

International Committee Of Legal Aviation Experts (CITEJA), Provisional Report on the 3d Session, May, 1928 (petitioners' translation of relevant excerpts) ... A-75

Second International Conference on Private Aeronautical Law Minutes, Warsaw, 1929 (R. Horner & D. Legrez trans. 1975) (relevant excerpts) A-82

Y.J. Blanc-Dannery, Convention de Varsovie (Paris 1933) (relevant excerpts) A-94

Y.J. Blanc-Dannery, Warsaw Convention (Paris 1933) (petitioners' translation of relevant excerpts) A-98

National L. J., May 23, 1988 (relevant excerpts).....A-100

Convention for the Unification of Certain Rules Relating to International Transportation by Air

WARSAW CONVENTION

Relevant Provisions

CHAPTER I. SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I.—PASSENGER TICKET

Article 3

(1) For the transportation of passenger the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II. BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22(2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage, check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

SECTION III. AIR WAYBILL

* * *

Article 8

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity,

and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(*j*) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22(2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carriers for each passenger shall be limited to the sum of 125,000 francs. Where in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of

periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French francs consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 28

(1) An action for damages must be brought; at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

CHAPTER V. GENERAL AND FINAL PROVISIONS

* * *

Article 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900

MONTREAL AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.
>
> Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other* carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

---

* Either alternative may be used.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and other Carriers parties to the Agreement.

Federal Aviation Regulation, 14 C.F.R. § 221.175(a)

Special notice of limited liability for death or injury under the Warsaw Convention. (a) In addition to the aforesaid requirements of this subpart, each carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

Advice to International Passengers on Limitation of Liability

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $10,000.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, The when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as ten point modern type and in ink contrasting with the stock on (1) each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) the ticket envelope; *And provided further*, That a carrier which has heretofore been furnishing a statement including either the sum of "$8,290" or the

sum of "$9,000," in place of the sum of "$10,000" in the text of the statement prescribed by this paragraph, may continue to use such statement until July 15, 1974.

Federal Aviation Regulation, 14 C.F.R. § 213.7

Filing requirements for adherence to Montreal Agreement.

It shall be a condition upon the holding of a foreign air carrier permit or other authority authorizing direct foreign scheduled air transportation that the holder have and maintain in effect and on file with the Board a signed counterpart of CAB Agreement 18900 (CAB Form 263), and a tariff (for those carriers otherwise generally required to file tariffs) that includes its provisions, and comply with all other requirements of Part 203 of this chapter. That form can be obtained from the Publications Services Division, Civil Aeronautics Board, Washington, D.C. 20428.

A-14

MINISTÈRE DES AFFAIRES ÉTRANGÈRES

CONFÉRENCE INTERNATIONALE

DE

DROIT PRIVÉ AÉRIEN

(27 OCTOBRE — 6 NOVEMBRE 1925)

PARIS

IMPRIMERIE NATIONALE

1926

A-15

AVANT-PROJET.

ARTICLE PREMIER.

La présente convention est applicable à tout transport par aéronef de voyageurs ou de marchandises avec ou sans transbordement, les points de départ et de destination étant situés dans deux États différents.

Elle ne s'appliquera pas toutefois aux transports réservés à l'Administration des Postes, même dans un seul des États intéressés.

ARTICLE 2.

Le transport international sera constaté par un billet de passage ou une lettre de voiture internationale, mentionnant leas points d'arrivée et de destination et, s'il y a lieu, les points de transbordement.

Ce billet de passage sera toujours nominatif et ne pourra être cédé. La lettre de voiture pourra être établie à personne dénommée, à ordre ou à porteur.

La letter de voiture indiquera notamment la nature et le poids des objets transportés, la déclaration de leur valeur si elle est faite par l'expéditeur, le prix et le mode de fixation du prix de transport et le lieu du payement.

ARTICLE 3.

Le transporteur est responsable des pertes, avaries et retards qui résultent de ses autes personnelles et du vice propre de l'appareil.

Le certificat administratif régulièrement délivré établit une présomption jusqu'à preuve contraire que l'appareil était au départ en bon état de navigabilité.

Le transporteur répond également des fautes commises par ses préposés à l'arrivée et au départ, de la réception, la manutention et la délivrance des marchandises.

ARTICLE 4.

Le transporteur n'est pas responsable des pertes, avaries ou retards:

1° au cas de force majeure en y comprenant les risques de l'air;

2° au cas de faute de voyageur ou du vice propre de la marchandise;

3° au cas de fautes non intentionnelles commises par le pilote ou les agents techniques dans la conduite de l'appareil et les opérations accessoires.

ARTICLE 5.

En aucun cas, la responsabilité de transporteur ne pourra dépasser la somme de dix mille francs par voyageur; toutefois le voyageur pourra en payant une taxe spéciale de garantie se faire garantir contre les risques du transporteur pour une somme déterminée.

Dans le transport des marchandises, la responsabilité du transporteur ne peut dépasser deux cents francs par colis ou unité sauf déclaration spéciale de valeur faite par l'expéditeur, qui aura toute liberté à cet égard.

Les valeurs ci-dessus sont des valeurs or.

ARTICLE 6.

Toute clause qui, dans le billet de passage ou la lettre de voiture, tendrait à exonérer le transporteur de la responsabilité établie dans la présente convention ou à établir une limite de responsabilité autre que celle fixée par l'article précédent sera nulle et de nul effet.

ARTICLE 7.

Au cas de décès du voyageur transporté, l'action en responsabilité ne peut être intentée que par le conjoint et les héritiers en ligne directe, légitimes ou naturels.

ARTICLE 8.

L'action en responsabilité sera portée au choix du demandeur devant le tribunal du lieu de départ ou du lieu de l'arrivée, ou

du lieu de l'accident, au cas d'arrêt de l'aéronef ou en cours de route.

La procédure sera réglée par la loi du tribunal saisi; toutefois, aucune formalité particulière ne peut être imposée au demandeur à raison de sa nationalité.

ARTICLE 9.

L'enlèvement des marchandises sans protestation, par le destinataire, constituera une présomption que les marchandises ont été délivrées en bon état et conformément au titre de transport. Toutefois, au cas d'avaries non apparentes ou de retard, le destinataire aura un délai de trois jours pour protester.

Toute protestation doit être faite par réserves inscrites sur le titre ou par une autre écrit.

ARTICLE 10.

L'action en responsabilité doit être intentée dans le délai d'une année à compter de l'arrivée à destination ou de l'arrêt de l'appareil.

Les causes de suspension et d'interruption de la prescription sont déterminées par la loi du tribunal saisi.

ARTICLE 11.

Les jugements prononcés, contradictoirement ou par défaut, par le juge compétent en vertu des dispositions de la présente convention, seront déclarés exécutoires dans les États signataires de la présente convention sans revision du fond de l'affaire.

ARTICLE 12.

Au cas de transports par aéronefs successifs avec transbordement, le voyageur ne pourra recourir que contre le transporteur qui a causé l'accident par sa faute.

Dans le même cas l'expéditeur de marchandises aura un recours contre *le premier transporteur et le destinataire contre*[1] le dernier et l'un et l'autre pourront en outre agir contre le transporteur qui a causé par sa faute la perte ou l'avarie.

---

1 Note du Secrétaire général. Les mots en italiques avaient été omis par erreur dans le texte d'avant-project distribué par le Gouvernement français; cette omission a été signalée au cours de la conférence par la Délégation française.

RAPPORT.

MONSIEUR LE PRÉSIDENT,

MESSIEURS,

La deuxième Commission a été chargée d'étudier le projet présenté par le Gouvernement français concernant la responsabilité du transporteur aérien. Présidée par le Professeur COGLIOLO, elle a tenu quatre séances consacrées à la discussion des textes; une commission restreinte formée de MM. RIPERT, MEGARRY, ARENDT, SCHREIBER et PITTARD a précisé, en une séance, les textes adoptés par la deuxième Commission.

Qu'il nos soit permis de remercier très sincèrement les auteurs du project français; le texte qui nos a été proposé a largement facilité notre travail et il a servi de base ainsi que de méthode pour l'étude délicate des règles de responsabilité.

Le texte de l'avant-project qui vous est soumis doit être repris en discussion plénière et la deuxième Commission n'entend nullement imposer le résultat de ses délibérations. Elle a formulé des dispositions juridiques qu'il vous est loisible de modifier; elle tient toutefois à vous donner un bref exposé des motifs qui ont dicté son avant-project.

Le transport international.—C'est évidemment un transport qui emprunte le territoire de plusiers pays; mais la se pose une première question: le caractère international est-il déterminé par le *fait* ou par *l'intention* des parties. Un aéronef quittant la France pour le Maroc survole l'Espagne; il est obligé d'atterrir dans ce dernier pays, son voyage prend-il de ce fait un caractère international? Un aéronef partant de France pour L'Angleterre termine son voyage par atterrissage en France; son voyage rentre-t-il dans la conception du droit interne, par le fait qu'il n'a pas passé d'un pays dans un autre?

La Commission a estimé que, pour l'application d'une convention internationale, il était préférable de se baser non pas sur un *fait* peut-être accidentel ou involontaire, mais sur *l'intention* des parties, autrement dit sur le caractère que les parties ont donné librement au contrat de transport au moment de sa conclusion; c'est cette préoccupation qui motive l'alinéa 2 de l'article premier.

Une seconde question concerne la nature même du transport. La plupart des législations admettent que dans les contrats a titre onéreux, la responsabilité est plus grand que dans le contrats gratuits. Il paraît donc utile de faire une distinction entre le transport rémunéré et le transport gratuit; mais d'autre part cette distinction n'exclut pas la fraude et l'on peut concevoir que la responsabilité que nos voulons imposer au transporteur ne soit annulée par une collusion plus ou moins libre donnant au transport le caractère gratuit alors que la rémunération sera stipulée sous une autre forme; enfin le transporteur peut avoir a transporter des passagers au bénéfice de titres de faveur.

Il a paru sage à la Commission d'appliquer la même règle à tous les cas de transport, qu'il y ait ou non rémunération.

On a posé la question du transport amical ou sportif, c'est-à-dire le cas d'un pilote qui emmène un ami à son bord pour une excursion non rétribuée.

Cette question a été résolue en considérant que, dans ce cas, il n'y a pas de contrat de transport et pour bien marquer cette différence, l'article 2 a ajouté le qualificatif "commerciaux".

Cela ne signifie pas qu'il ne soit pas utile de déterminer la responsabilité du transporteur sans contrat; mais la Commission a estimé que cela sortait de son cadre et elle vous propose de le renoyer à la première Commission qui verra à l'inscrire dans le plan général de la réglementation aérienne.

L'article 2 embrasse donc tous les transports commerciaux, quelle que soit la nature de l'aéronef, mais il a excepté les transports postaux parce que ceux-ci sont régis par des conventions spéciales entre États.

La terme "corporation de droit public" peut paraître insolite ou constituer un néologisme; la Commission vois le propose à défaut de mieux, comme comprenant les personnes morales non privées, c'est-à-dire l'État, les communes, les administrations publiques, etc.

Forme du contrat.—Le contrat de transport est-il conventuel ou formel? L'opinion unanime de la Commission est que le contrat est conventuel; mais il y a une grande importance pratique à préciser les conditions du transport notamment pour la preuve éventuelle.

Ainsi avons-nous admis que le titre de transport prévue à l'article 3 constate l'existence du contrat mais ne le constitue pas.

Il faut exiger, dans la pratique, l'établissement d'une billet du passage ou d'une lettre de voiture sans que toutefois l'ommission de ce titre influe sur l'existence du contrat; il faut aussi que l'expéditeur puisse exiger un récépissé de la marchandise et, à cet égard, il semble que le moyen le plus simple réside dans la remise d'un double de la lettre de voiture certifié par signature ou timbre du transporteur.

Ces lois nationales devront pourvoir, par des prescriptions pénales, à ce que ces exigences soient réellement sanctionnées.

Le titre de transport n'est qu'un "instrumentum", mais il a une importance indéniable. Nous avons estimé nécessaire d'en préciser la forme, de façon à faciliter l'adoption d'un modèle unique par les diverses entreprises de transports aériens.

Les mentions que doit contenir le titre de transport sont énumérées à l'article 4; elles ne sont pas limitatives et point n'est besoin d'en justifier l'exigence. Nous n'avons pas précisé les documents qui accompagnent éventuellement la lettre de voiture, car il appartient d'une part à chaque État d'en établir la liste et d'autre part au transporteur de refuser une marchandise sans papiers réguliers. Ici nous posons seulement la règle que la lettre de voiture mentionnera à titre de simple inventaire les documents quels qu'ils soient qui lui seront annexés.

Comme pour le transport par chemin de fer nous avons admis que l'expéditeur répond de l'exactitude des mentions inscrites sur la lettre de voiture et que cette responsabilité sera attestée par la signature de l'expéditeur apposée sur la lettere de voiture.

Responsibilité à raison des accidents, pertes, retard, avaries.—C'est la le point capital de notre projet et nous tenons à répéter ici que le texte qui vous est proposé peut donner lieu à d'amples discussions.

La Commission s'est demandée quel régime de responsabilité il fallait adopter: risque ou faute. L'opinion générale est que, tandis que la responsabilité civile à l'égard des tiers, doit comporter l'application de la théorie du risque, en revanche, dans la

responsabilité du transporteur à l'égard des passagers et des marchandises, il faut admettre la théorie de la faute.

Ce premier point acquis, on peut se demander à qui incombe le fardeau de la preuve; il a paru équitable de ne pas imposer cette lourde charge au lésé et l'on a admis la présomption de faute à la charge du transporteur. Mais comme ce n'est qu'une présomption, le transporteur a évidemment le droit de rapporter la preuve contraire et l'on doit alors établir nettement la limite de la faute; où commence celle-ci?

Que peut-on exiger du transport aérien? Une organisation normale de son exploitation, un choix judicieux de son personnel, une surveillance constante de ses agents et préposés, un contrôle sérieux de ses appariels accessoires et des matières employées.

Il faut bien admettre que celui qui utilise un aéronef n'ignore pas les risques inhérents à un mode de circulation qui n'a pas encore atteint le point de perfection que cent années ont donné aux chemins de fer.

Il est donc juste de ne pas imposer au transporteur une responsabilité absolue et de le dégager de toute responsabilité lorsqu'il a pris les mesures raisonnables et normales pour éviter le dommage; c'est la diligence que l'on peut exiger du bon père de famille.

Dans l'état actuel de l'aéronautique il semble indiqué de s'en tenir là, tout en prévoyant pour un avenir peut-être lointain, une assimilation possible avec la responsabilité du chemin de fer.

Plus délicate encore est la question de la responsabilité du transporteur pour ses préposés.

Le texte qui vous est soumis comporte l'application de deux principes. Le premier est d'une application générale, à savoir que le maître répond des actes de ses préposés; le second, déjà retenu pour la responsabilité du transporteur, c'est qu'il n'ya pas de responsabilité sans faute, celle-ci étant présumée jusqu'à preuve rapportée de la diligence raisonnable.

On peut se demander si la responsabilité du transporteur ne se trouve pas ainsi plus étendue en ce qui touche le préposés que pour lui-même; mais c'est là une simple apparence. En effet, dans les deux cas, il n'y a de responsabilité que s'il y a faute ou

plus exactement si il faut présumée n'a pas été annulée par la preuve que les mesures raisonnables ont été prises pour éviter le dommage; mais, tant que cette preuve n'est pas rapportée, la présomption de faute subsiste et le maître est responsable aussi bien du fait de ses préposés que des siens propres.

Il a paru toutefois nécessaire d'apporter une restriction à cette responsabilité; il faut considérer, dans tout transport, les manœuvres techniques qui touchent à la circulation proprement dite de l'aéronef, et les manipulations commerciales qui ne relèvent pas du droit aérien (emballage, chargement, arrivage, déchargement, conservation de la marchandise soit avant le transport, soit en cas d'interruption, soit à l'arrivée jusqu'à livraison).

Tandis que pour ces dernières manipulations, il n'y a aucun motif de dégager le transporteur de sa responsabilité, en revanche, on peut supprimer la responsabilité du transporteur pour les fautes de navigation de ses préposés s'il prouve qu'il a pris lui-même toutes les measures propres à éviter le dommage. A l'appui de cette disposition, deux arguments principaux se présentent; tout d'abord, il ne faut pas enlever à l'équipage le sentiment de las responsabilité propre, puis il faut admettre qu'en l'état actuel, la circulation aérienne comporte certains risques inhérents à la nature même de ce mode de transport (risque d'air) et que l'expéditeur doit en tenir compte et en prendre sa part.

Limite et exonération de la responsabilité.—Les articles 7 à 9 de l'avant-projet forment un tout et doivent être envisagés dans leur ensemble.

La Commission a adopté le principe fondamental que la clause d'exonération devait être interdite, tant pour les personnes que pour les biens, on a voulu ainsi empêcher des conventions dans lesquelles les parties ne se trouveraient pas à égalité dans la liberté de leur consentement.

L'expéditeur pourrait voir refuser le transport s'il ne souscrivait pas à une clause d'exonération; mais il faut tenir compte aussi, par contre, d'un élément économique important, à savoir que l'exploitant doit pouvoir mesurer la portée des risques qu'il assume; c'est pour satisfaire à cette double exigence que

l'avant-project interdit au transporteur de supprimer ou d'abaisser sa responsabilité au-dessous d'une certaine valeur, et qu'il limite en même temps le maximum de responsabilité du transporteur à 10,000 francs pour les personnes et 200 francs or par colis. Naturellement les parties peuvent élever la valeur de la vie des passagers et des marchandises au-dessus de la limite prévue par l'avant-projet et cela au moyen d'une clause spéciale qui peut être assimilée d'une part à l'assurance pour les personnes et à la déclaration d'intérêt à la livraison pour les choses (analogie avec la Convention de Berne pour les transports par chemin de fer).

Dans ce domaine, une question spéciale s'est posée en ce qui concerne l'action des ayants droit en cas de décès du passager. Ceux-ci agissent-ils comme héritiers ou *jure proprio*? Il y a intérêt à déterminer exactement l'etendue des droits des ayants-cause, car selon les lois nationales, la nature de leurs droits pourrait entrainer une interprétation diverse du fondement juridique et annuler en quelque sorte la limitation fixée par l'avant-projet; comme il est à peu près impossible de fixer dans une formule unique les diverses conceptions juridiques des divers Etats, il a paru plus simple de préciser dans l'article 8 que les ayants-droit seraient déterminés par la loi nationale du défunt, mais que les droits de ces personnes seraient limités à la somme maximale admise par l'article 7.

En résumé, grâce à ce système, le transport aérien jouit d'une protection qu'il n'est pas permis de supprimer et le transporteur peut mesurer nettement ses risques et les couvrir, ce qui a une grande importance pour la fixation des prix de transport et conséquemment pour le développement de la navigation aérienne.

Compétence et juridiction.—L'opinion générale des juristes en matière aérienne est favorable à l'extension des règles de compétence et aucune objection n'a été faite aux dispositions de l'article 8, alinéa, 1 du projet français; la Commission a ajouté le for normal du defendum (*forum rei*).

En ce qui concerne la procédure, il a été émis le vœu que le demandeur ne soit soumis à aucune formalité particulière et à aucune charge spéciale (caution *judicatum solvi*) à raison de sa

nationalité; cette règle a été inscrite à l'article 10, alinéa 2 de l'avant-projet.

L'article 11 prévoit la règle générale en matière de transport pour ce qui touche à la procédure de reconnaissance de la marchandise et n'appelle pas un commentaire spéciale.

L'article 12 limite la durée du délai de recours; le projet français établissait la prescription d'un an et cela a paru normal; mais la diversité des législations en matière d'interruption et suspension, comme aussi la distance possible et présumable en cas de transport aérien, comme enfin la nécessité, en ce qui touche les blessures et l'incapacité des victimes, de permettre une appréciation plus exacte de la portée de la responsabilité, tous ces éléments ont engagé la Commission à élever à deux ans la durée de la prescription.

Il a fallu prévoir l'intervention de plusieurs transporteurs successifs dans les transports continus; la responsabilité, dans ce cas, doit être réglée différemment selon qu'il s'agit d'une personne ou d'une marchandise.

Le principe normal est que la responsabilité incombe au transporteur sur le réseau duquel le dommage s'est produit.

S'il s'agit d'un accident survenu à une personne, il n'y a aucun motif pour ne pas appliquer la règle générale et l'action devra être dirigée contre le transporteur responsable de l'accident. En revanche, la situation est tout autre en ce qui concerne les marchandises; en premier lieu, il n'est pas toujours facile de déterminer quand une avarie s'est produite; en second lieu, chaque transporteur peut vérifier l'état apparent dans lequel se trouve la marchandise au moment où il en prend possession; enfin il y a un mandat dont la marchandise est l'objet (ce qui n'est pas le cas pour le transport des personnes); ce mandat crée une responsabilité collective et solidaire des transporteurs; mais pour éviter toute confusion comme tout abus, l'article 13 dispose que l'expéditeur s'adressera au premier transporteur, le destinataire s'adressera au dernier et l'un et l'autre pourront s'adresser au transporteur sur le réseau duquel l'avarie se sera produite.

Pour compléter les règles touchant la compétence, la Commission a rédigé un article 14 dont la portée est assez sérieuse; cet article interdit toute prorogation de for et toute convention

concernant la loi applicable intervenue au moment de la conclusion du contrat de transport. Le motif est facile à saisir; l'avant-projet fixe des limites de responsabilité, repousse la clause d'exonération, détermine le for de l'action ainsi que le délai de prescription; tout cela forme un ensemble et deviendrait sans utilité si l'un des termes pouvait être modifié par convention particulière; il faut donc interdire la prorogation de for et le choix de la loi applicable comme on interdit la clause d'exonération.

Application de la Convention.—L'article 15 dispose que la Convention s'appliquera dans chaque État contractant à tous les transports internationaux ayant leur point de départ ou leur point d'arrivée dans un État contractant.

Il a été soutenu une opinion diverse exigeant pour l'application de la Convention que les deux Etats fussent contractants; mais cette opinion a été écartée pour les motifs suivants:

1° Il faut que la Convention se généralise le plus possible et pour cela, il est préférable d'étendre plutôt que de restreindre son champ d'application.

2° En raison des motifs développés précédemment et par lesquels le caractère international du transport résulte de l'intention des parties, il suffit que le point de départ se trouve dans un État contractant.

3° Si le point d'arrivée seul se trouve dans un État contractant, il y a utilité très grand tant pour le transporteur que pour l'intéressé au transport à connaître exactement les conditions dans lesquelles la responsibilité existe et s'applique: cela permet à chacun de mesurer ses risques abstraction faite de la loi commune applicable dans le lieu d'arrivée, loi souvent inconnue.

La Commission a limité son étude à responsibilité du transportateur aérien.

Au cours de son travail, elle a noté quelques points qui lui ont paru très importants mais qui échappaient à sa compétence:

1° Il s'agit de déterminer la responsibilité du pilote où du propriétaire dans les cas où le transport ne constitue pas un contrat (transport amical ou sportif).

2° Il s'agit aussi de recommander d'insérer dans les législations nationales les garanties propres à assurer l'application de l'article 3.

3° Il faut aussi réglementer des points qui touchent au transport aérien mais qui ne concernent nullement les risques de l'air: entrepôt des marchandises, avis d'arrivée au destinataire, livraison à domicile, etc.

4° Enfin et surtout la Commission émet le vœu que les Gouvernements réalisent le plus rapidement possible un accord facilitant l'exécution des jugements rendus à l'étranger.

L'avant-projet qui vous est soumis n'est qu'un exposé des principes à adopter, mais si la Conférence estime devoir lui donner la forme d'une Convention internationale, il faudra y ajouter les clauses de durée de la Convention, de dénonciation, de ratification, etc.

Votre rapporteur s'excuse d'avoir retenu si longtemps votre attention; il s'excusera par un mot de J. J. ROUSSEAU: je n'ai pas eu le temps d'être plus bref.

Paris, le 2 novembre 1925.

E. PITTARD,
Rapporteur.

PROJET DE CONVENTION.

.....

également désireux de donner une solution à l'importante question de la responsabilité du transporteur dans les transports internationaux par aéronefs, ont résolu de conclure une Convention et ont, en conséquence, nommé pour leurs Plénipotentiaires, savoir:

.....

lesquels, après s'être communiqué leurs pleins pouvoirs, trouvés en bonne et due forme, sont convenus des dispositions suivantes:

ARTICLE PREMIER.

Est qualifié "transport international", au sens de la présente Convention, tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination sont situés dans deux Etats différents, qu'il y ait ou non interruption de transport ou transbordement.

ARTICLE 2.

Le présente Convention s'applique aux transports internationaux par aéronefs de caractère commercial, effectués avec ou sans rémunération, y compris ceux qui sont effectués par l'État et les personnes juridiques de droit public.

Sont exceptés de l'application de la présente Convention les transports postaux effectués sous l'empire des conventions postales internationales.

ARTICLE 3.

Le transport international sera constaté par un billet de passage ou une lettre de voiture.

Le transporteur sera tenu, à la demande de l'expéditeur, de lui délivrer un double de la lettre de voiture dûment certifié.

L'absence, l'irrégularité ou la perte du titre de transport ne préjudicie ni à l'existence ni à la validité du contrat de transport.

ARTICLE 4.

Le billet de passage et la lettre de voiture mentionneront notamment:

Les points de départ et de destination,

l'itinéraire à suivre,

le nom et l'adresse du transporteur,

le prix du transport, la date et le lieu du payement,

l'indication de la limite légale de responsabilité, et, s'il y a lieu, de la garantie supplémentaire du transporteur suivant l'Article 7,

le lieu et la date de l'émission.

La lettre de voiture indiquera, en outre, notamment:

le nom et l'adresse de l'expéditeur et du destinataire,

le délai de transport, s'il est stipulé,

la nature de la marchandise et le mode d'emballage,

le nombre, les marques, les numéros et le poids des colis,

la déclaration de leur valeur, si elle est faite par l'expéditeur, conformément à l'article 7,

les documents remis au transporteur pour accompagner la lettre de voiture.

La lettre de voiture sera signée par l'expéditeur qui répondra de l'exactitude des mentions qui y sont contenues.

ARTICLE 5.

Le transporteur est responsable des accidents, pertes, avaries et retards.

Il n'est pas responsable s'il prouve avoir pris les mesures raisonnables pour éviter le dommage; cette preuve est admise même dans le cas où le dommage provient d'un vice propre de l'appareil.

ARTICLE 6.

Le transporteur répond des fautes commises par ses préposés. Toutefois, en cas de faute de navigation, le transporteur ne sera pas responsable s'il fait la preuve prévue à l'article précédent.

ARTICLE 7.

La responsabilité du transporteur est limitée à la somme de dix mille francs par voyageur. Toutefois, par un convention spéciale avec le transporteur, le voyageur pourra fixer une limite de responsabilité plus élevée.

Dans le transport des marchandises, la responsabilité du transporteur est limitée à la somme de deux cents francs par colis, sauf déclaration spéciale de valeur faite par l'expéditeur, auquel cas le transporteur sera tenu de payer la valeur déclarée à moins qu'il ne prouve qu'elle est supérieure à la valeur réelle au point destination.

Les valeurs ci-dessus sont des valeurs or. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds.

ARTICLE 8.

Au cas de décès du voyageur transporté, l'action en responsabilité pourra être exercée par personnes auxquelles cette action appartient d'après la législation nationale du défunt, mais sous réserve de la limitation de responsabilité prévue à l'Article précédent.

ARTICLE 9.

Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente Convention sera nulle et de nul effet.

ARTICLE 10.

L'action en responsabilité sera portée, au choix du demandeur, soit devant le Tribunal du domicile du défendeur, soit devant celui du lieu de départ ou du lieu de destination, soit devant celui du lieu de l'accident.

La procédure sera réglée par la loi du Tribunal saisi; toutefois aucune formalité particulière ou caution ne peut être exigée du demandeur à raison de sa nationalité.

* * *

MOTION

Après avoir dressé, à titre d'exemple, la liste des questions dont l'étude devrait immédiatement suivre l'examen du problème de la responsabilité du transporteur par aéronefs, la Conférence, considérant l'importance, l'urgence, la complexité et la nature techniquement juridique de ces questions, exprime le vœu que soit, à bref délai, nommé un Comité spécial d'Experts chargé de préparer la continuation des travaux de la Conférence.

Ce comité serait composé d'un nombre restreint de membres. Son siège normal serait à Paris.

La Conférence prie, en conséquence, le Gouvernement français de bien vouloir se metter en rapport avec les Gouvernements invités à cette Conférence pour examiner la suite à donner à cette recommandation.

La Conférence émet le vœu que les premières questions étudiées par ce Comité soient:

Dommages causés par les aéronefs aux biens et aux personnes sur le sol.

Assurance obligatoire.

Établissement de registres aéronautiques: propriété de l'aéronef, droits réels, hypothèque.

Saisie.

Location d'aéronef.

Abordage aérien.

Condition juridique du commandant de l'aéronef.

Lettre de voiture.

Règles uniformes pour la détermination de la nationalité de l'aéronef.

EN FOI DE QUOI, les Délégués soussignés ont arrêté le présent Protocole final, dont une copie, certifiée conforme, sera remise à chacun des Gouvernements respectifs.

Fait à Paris, en un seul exemplaire, le 6 novembre 1925.

COMITÉ INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUES AÉRIENS

COMPTE-RENDU

DE LA 2E SESSION

Avril 1927

M. COGLIOLO (Italie) formule une critique contre le paragraphe 2 de l'article 3, ainsi rédigé:

"L'absence, l'irrégularité ou la perte de ce titre, ne préjudicie ni à l'existence, ni à la validité du contrat de transport".

On conçoit que la perte de la lettre de transport aérien ne préjudicie pas à l'existence du contrat de transport car il en est de même pour la perte d'une lettre de change. Mais, en ce qui concerne l'absence ou l'irrégularité de la lettre de transport, M. COGLIOLO doute, pour une raison de forme et pour une raison de fond, de l'utilité de l'article qui déclare que cela ne préjudicie pas à l'existence ou à la validité du contrat. La raison de forme est que c'est diminuer singuliérement la valeur de la lettre de transport aérien que de dire, dans un article qui règle toute la question, que son absence ne préjudicie ni à l'existence, ni à la validité du contrat de transport. La raison de fond est qu'il est nécessaire de résoudre la question, très fréquente en droit maritime en ce qui concerne le connaissement. M. COGLIOLO se demande s'il ne serait pas préférable de dire que le transporteur a le droit de le demander à l'expéditeur l'établissement de la lettre de transport aérien et que l'expéditeur a le droit de demander également, mais que, pour les transportes internationaux, une lettre de transport aérien est obligatoire.

M. DE VOS, Rapporteur, expose que l'observation de M. COGLIOLO est précisément un des points qui ont soulevé le plus de difficultés lors de l'examen par la Commission. Il a paru impossible à certaines délégations, et notammant à la Délégation Britannique, d'introduire l'obligation de la lettre de transport aérien pour tous les transports. Cette Délégation estime trés difficile de faire accepter par la législation britannique l'établissement d'une sanction pénale adéquate correspondant à cette obligation. Les experts britanniques ont fait observer qu'en n'imposant pas le principe de l'obligation le résultat pratique serait néanmoins le même. Pour eux, il serait possible d'arriver au même résultat de la manière suivante:

I° - les transporteurs doivent être poussés à se servir d'une lettre de transport aérien chaque fois qu'ils font un contrat de

transport international sans toutefois qu'il soit rendu illégal de s'en dispenser,

2° - si le transporteur se sert d'une lettre de transport, ce document doit (sans qu'il soit toutefois illégal de les omettre) contenir certaines mentions essentielles (mentions numérotées de a) à g) à l'article 7 du projet de convention),

3° - la méthode à adopter pour atteindre ces deux buts devrait être de rendre matériellement avantageux aux transporteurs de faire usage d'une lettre de transport aérien contenant les mentions essentielles et de les mettre dans une situation moins favorable s'ils préférent conclure un contrat de transport sans lettre de transport ou sans les mentions essentielles.

En conséquence, la Délégation Brittannique a proposé à la Commission:

a) que la convention stipule que si un contrat de transport est conclu, sans l'établissement d'une lettre de transport aérien contenant les mentions essentielles, le transporteur perdra les avantages qui lui sont conférés par les articles 5, 6 et 7 de l'avant-projet de Convention sur la responsabilité (sans toutefois porter atteinte aux autres dispositions dudit avant-projet) et qu'un tel contrat, en ce qui concerne les matières auxquelles ont trait les articles précités, est régi par le droit commun,

   La sanction sera de cette façon non seulement automatique, uniforme et universelle, mais elle se trouvera dans le cadre même de la Convention.

b) qu'il soit annexé à la Convention un modèle de lettre de transport dont l'usage serait recommandé.

Il a paru à la Commission que cette conception, très différente évidemment des conceptions latines, pouvait être fort utile et qu'en acceptant ce minimum d'obligations, il était possible d'obtenir l'unanimité et de faire adopter la lettre de transport aérien.

D'autre part, si la mention, au second alinéa de l'article 3, du mot "absence" semble indiquer une contradiction et que, dès qu'il s'agit de régler l'existence de la lettre de transport aérien,

on ne devrait pas parler de son absence, il n'y a là qu'une apparence. Le maintien du mot "absence" indique simplement que la lettre de transport n'est pas obligatoire et que le transport reste valable même sans ce document.

M. PITTARD (Suisse) ajoute que si le mot "absence" n'était pas maintenu, le transporteur ne ferait pas de lettre de transport pour échapper à la convention; tandis qu'avec le maintien du mot "absence" le transporteur reste soumis à la Convention et l'on vise ainsi le transport privé d'un individu faisant exceptionnellement un transport contre rémunération.

M. RIPERT (France) rappelle qu'il a été prévu, par la Deuxième Commission, à l'article 16 de l'avant-projet de convention, une sanction très énergique contre celui qui ne fera pas de lettre de transport: cette sanction consiste en ce que les dispositions de la convention s'appliqueront à lui en tant qu'elle lui sont défavorables et qu'il ne pourra réclamer les exonérations contenues dans la Convention.

Le Président propose de réserver le paragraphe 2 de l'article 3 jusqu'à la discussion de l'article 16, dont il vient d'être parlé. Il en est ainsi décidé.

Le Président donne alors lecture de l'article 4, ainsi conçu, faisant remarquer que, dans le texte définitivement adopté, le terme "lettre de voiture" sera remplacé partout par le terme "lettre de transport aérien".

"Tout transporteur a le droit de demander à l'expéditeur l'établissement et la délivrance d'une lettre de voiture; tout expéditeur a le droit de demander au transporteur l'acceptation d'un pareil document."

Personne ne demandant la parole, cet article est mis aux voix et adopté.

Le Président donne lecture de l'article 5, ainsi rédigé:

"La lettre de voiture est établie par l'expéditeur en trois exemplaires et remise avec la marchandise.

Ces trois exemplaires ont la même valeur.

Le premier exemplaire porte la mention "pour le transporteur"; il est signé par l'expéditeur. Le deuxième exemplaire porte la mention "pour le destinataire"; il est signé par l'expéditeur et le transporteur et il accompagne la marchandise. Le troisième exemplaire est signé par le transporteur et remis par lui à l'expéditeur après l'acceptation de la marchandise."

Personne ne demandant la parole, cet article est mis aux voix et adopté.

Le Président passe alors à l'article 5, ainsi rédigé:

"Le transporteur a le driot de demander à l'expéditeur l'établissement d'exemplaires de lettres de voiture différents lorsqu'il y a plusieurs colis.

Il peut aussi faire établir une ou plusieurs copies pour les facilités du service de transport, notamment des exemplaires d'escales, d'aérodromes de départ et d'arrivée. Ces copies porteront l'indication de leur affectation; elles n'ont pas la valeur des trois exemplaires de la lettre de voiture. Ni les exemplaires ni les copies n'ont la valeur d'un connaissement."

M. RIPERT (France) remarque que la dernière phrase du deuxième paragraphe de l'article 6 ne parait pas satisfaisante parce qu'elle constitue une formule négative. L'idée qu'elle veut exprimer a été reproduite de la Convention de Berne. Dans tous les Etats il existe cette conception du connaissement: que celui-ci représente véritablement la marchandise transportée. Celui qui a le connaissement en main devient le possesseur réel de la marchandise. Celle-ci est embarquée sur le navire, sous la garantie du capitaine; elle doit arriver dans un port déterminée, de sorte qu'elle échappe véritablement à l'expéditeur et qu'elle est à la disposition réelle du destinataire. On a pensé qu'une pareille conception ne pouvait pas être introduite dans la navigation aérienne à cause de la rapidité du transport des marchandises et aussi parce que la remise au destinataire n'est pas aussi bien assurée. Il semble que l'on pourrait indiquer, sous une forme positive, que la lettre de transport ne donne pas la possession réelle de la marchandise.

Cette proposition, mise aux voix, n'est pas adoptée.

Le Président demande si quelqu'un à d'autres observations à faire sur l'article 7.

M. LEBINSKI (Pologne) attire l'attention du Comité sur le mot "itinéraire" au paragraphe 6) de l'article 7. Le Comité Juridique de l'Aviation, qui s'est longuement occupé de la terminologie juridique, a accepté au lieu du mot "itinéraire" les mots "route aérienne". Cette appellation pourrait peut-être, le cas échéant, être prise en considération.

Le Président déclare que cette intéressante observation sera retenue au procès-verbal.

M. DOBKEVIEGIUS (Lithuanie) fait remarquer qu'en ce qui concerne le mot "quantité" il ne semble pas qu'il soit compris dans les autres spécifications du paragraphe (i) et il en estime utile la maintien. D'autre part, il se demande ce que l'on entend par le mot "contenanse".

De l'avis de M. PITTARD (Suisse), c'est le mot "contenu" qu'il faudrait employer.

Le Président déclare, avec le consentement du Rapporteur, que le Sous-Comité de Rédaction reverra ce texte comme il vient d'être dit.

Il met aux voix l'ensemble de l'article 7 qui est adopté.

Le Président donne lécture de l'article 8, ainsi conçu:

"La lettre de voiture doit contenir une clause stipulant que le transport est soumis au régime de la responsabilité établie par la Convention Internationale du 6 Novembre 1925, ainsi que les dispositions principales de celle-ci."

A la suite d'un échange de vues auquel prennent part M. RICHTER (Allemagne), M. COGLIOLO (Italie) et le Rapporteur, il est décidé que le texte de l'article 8 sera ainsi rédigé:

"La lettre de voiture doit contenir une clause stipulant que le transport est soumis au régime de la responsabilité établie par la Convention Internationale du . . ."

Le Secrétaire signale au Comité qu'il n'a pas encore nommé son Sous-Comité de Rédaction et qu'il y aurait lieu de procéder,

dès maintenant, à sa désignation s'il désire que ce Sous-Comité se réunisse et présente son texte avant la fin de la session.

"L'expéditeur est responsable envers le transporteur du tous dommages qui pourraient résulter de l'absence, de l'insuffisance ou de l'irrégularité de ces pièces.

"Le transporteur n'est pas tenu d'examiner si les papiers sont exacts ou suffisants."

Aucune observation n'étant faite, cet article mis aux voix est adopté.

Le Président soumet au Comité l'article 16, ainsi rédigé:

"Si une lettre de voiture contenant toutes les mentions indiquées par l'article 7, lettres a) à g), et par l'article 8 n'a pas été délivrée pour un transport international, le transporteur n'en sera pas moins soumis aux règles de la Convention Internationale sur la responsabilité, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de ladite Convention qui l'exenèrent de sa responsabilité ou des fautes de ses préposés ou qui établissent une limitation de responsabilité."

M. YOUPIS (Grèce) estime que la sanction prévue par cet article et qui consiste à priver le transporteur de tous les avantages de la convention se comprend pour une Compagnie puissante, mais que pour un particulier faisant accidentellement un transport international de marchandises l'absence de limitation de la responsabilité serait, à son avis, une sanction trop sévère.

M. PITTARD (Suisse) ne partage pas cet avis. La limitation de la responsabilité a été envisagée pour amener à la conclusion d'une assurance, si un transportateur accidental de marchandises vont s'aceurer, il n'a qu à limiter sa responsabilité au moyen d'une lettre de transport. Il y a là une barrière trés utile obligeant les transporteurs à rentrer dans le cadre de la convention.

M. PINEDA DE MONT (Guatémala) appuie cette manière de voir.

Le Comité, consulté par le Président, décide d'adopter le texte de l'article 16 tel qu'il a été présenté.

Le Président signale au Comité qu'il y a lieu de reprendre le paragraphe 2 de l'article 3 qui avait été réservé:

"L'absence, l'irrégularité ou la porte de ce titre, ne préjudicie ni à l'existence, ni à la validité du contrat de transport."

Le Président rappelle que le Comité est en présence de deux propositions:

* * *

ENCLOSURE (A) TO DESPATCH N°

COMITÉ INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUES AÉRIENS

COMPTE RENDU PROVISOIRE

DE LA 3E SESSION

Mai 1928

CHAPITRE II

Titres de transport. — Section I. — Billet de passage

ARTICLE 3.
Paragraphe premier.

"Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes:

a) le lieu et la date de l'émission,

b) les points de départ et de destination,

c) l'indication sommaire de la voie à suivre (*via*), ainsi que les points d'arrêts prévus,

d) le nom et l'adresse du ou des transporteurs."

Le Rapporteur rappelle que l'I.A.T.A. a formulé certaines observations au sujet de cet article 3:

La première observation demande la suppression sur le billet de passage des points d'arrêts prévus.

Le Rapporteur donne lecture des arguments donnés à ce sujet par l'I.A.T.A.:

"Il ne convient pas que le billet de passage contienne aussi les points d'arrêts prévus. Il y a aujourd'hui déjà des communications aériennes journalières entre deux endroits avec arrêts prévus et sans arrêts prévus. Nous renvoyons à ce sujet à la ligne aérienne régulière de la Deutsche Luft Hansa, entre Berlin et Zurich, qui se pratique chaque jour en partie avec arrêts à Halle, Leipzig, Erfurt et Stuttgart, en partie sans arrêt. Le trafic aérien doit tâcher d'organiser d'une façon égale, alternativement, des communications directes et des communications avec arrêts. Quoique le billet de passage indique régulièrement une heure fixe, il arrive cependant fréquemment qu'il y soit apporté des changements. Etant donné que plusieurs stations sont très surchargées, il ne peut être garanti, qu'en cas de pareils changements, les arrêts tels qu'ils sont indiqués sur le plan soient ajoutés ou biffés.

D'après les termes de l'article premier, il importe seulement de marquer sur le billet de passage, les points d'arrêts indiqués sur le plan qui sont situés dans un pays, dans lequel ne se trouvent pas en même temps le point de départ et le point d'arrivé. Par conséquent, si maintenant des arrêts prévus doivent être mentionnés dans le billet de passage, cela ne peut concerner que les derniers points d'arrêts.

En faisant cette proposition, nous voudrions qu'on considère que les sociétés de trafic aérien ne disposent pas dans les stations respectives d'un personnel aussi nombreux que, par exemple, les chemins de fer et les compagnies de navigation. C'est pourquoi, il est nécessaire que le personnel soit déchargé de tout travail d'écriture qui n'est pas absolument indispensable. Cela importe principalement, si de la délivrance défectueuse d'un billet de passage, il peut résulter pour la société de trafic aérien quelque préjudice."

L'I.A.T.A. a formulé une seconde proposition: l'addition du numéro du bulletin de bagage sur le billet de passage.

La première de ces propositions: suppression de la lettre *c*) a déjà été étudiée antérieurement par les Experts qui l'ont discutée et rejetée, le Rapporteur ne la retient donc pas. La seconde proposition résulte de la pratique et paraît intéressante: l'article 4 prévoyant le numéro du billet de passage, il serait possible de prévoir que le numéro du bulletin de bagage serait porté sur le billet de passage. Toutefois, au point de vue de la convention, cette proposition ne présente pas d'intérêt juridique, elle ne présente d'utilité que pour le transporteur, aussi mettra-t-il cette mention sur le billet que cela soit dit dans la Convention ou non.

Le Président demande au Comité s'il entend retenir cette suggestion qui ne semble pas avoir sa place dans le texte de la Convention.

Aucune autre observation n'étant faite sur le paragraphe premier, et la suggestion de l'I.A.T.A. n'étant pas retenue, le paragraphe premier de l'article 3 mis aux voix est adopté.

Paragraphe 2

"Le billet de passage doit contenir, en outre, une clause stipulant que le transport est soumis au régime de la responsabilité établi par la présente Convention."

M. PITTARD rappelle qu'il a été entendu que des modèles des billets seraient annexés à la Convention ainsi qu'il en a été fait pour la Convention de Berne relative aux chemins de fer. Ces modèles doivent comporter le minimum d'indications, les Compagnies étant libres d'ajouter toutes celles qui leur paraissent utiles.

Le Rapporteur indique que la chose est formellement prévue à l'article 19.

Le paragraphe 2 est alors mis aux voix et adopté.

Paragraphe 3

"L'absence, l'irrégularité ou la perte de ce titre de transport ne préjudicie ni à l'existence ni à la validité du contrat de transport."

Aucune observation n'étant présentée, le paragraphe 3 est adopté.

Paragraphe 4

"Si, pour un transport international, le transporteur accepte le voyageur sans qu'il ait été établi un billet de passage contenant les mentions indiquées ci-dessus, le contrat de transport n'en sera pas moins soumis aux règles de la présente Convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent en tout ou en partie sa responsabilité directe ou dérivée des fautes de ses préposés."

M. YOUPIS croit devoir signaler que la sanction prévue dans ce paragraphe est trop sévère lorsqu'il s'agit d'une simple omission. Il est dit, en effet, "sans qu'il ait été établi un billet de passage contenant les mentions indiquées ci-dessus. . ." L'absence de l'indication du lieu d'émission ou de la date par exemple, retirera au transporteur le droit de se prévaloir des

dispositions qui l'exonèrent de la responsabilité. Il demande que l'on ajoute, à la fin de l'alinéa 4, la phrase suivante: "Si ce billet de passage ne contient pas l'une des mentions indiquées ci-dessus, le transporteur n'aura ce droit que dans la mesure où aucun dommage n'aura été causé aux voyageurs".

M. PITTARD estime que la Convention doit se défendre elle-même. Cette question a été étudiée à fond. S'il y a omission d'une des mentions exigées il y a faute professionnelle et il est nécessaire qu'elle entraîne une sanction.

Le Rapporteur ajoute, qu'ainsi que vient de l'indiquer M. PITTARD, de longues discussions antérieures ont abouti au texte actuellement proposé; la seule sanction pratique qui a été trouvée est celle qui dérive de la convention même. Ces omissions que M. YOUPIS considère comme légères ne le sont pas en fait: Tout ce qui est indiqué comme mentions obligatoires ayant une grande importance. Il rappelle que M. le Professeur COGLIOLO a dit, antérieurement à ce sujet:

"Un service de transports publics doit toujours avoir ses papiers en règle et on doit être plus sévère pour lui que pour un simple oubli d'un voyageur."

M. YOUPIS persiste à trouver que le texte actuel est trop sévère et qu'il pourrait être atténué dans le sens indiqué par lui lorsque personne n'a été lésé.

Le Rapporteur maintient le texte de la Commission Il rappelle que cette disposition, qui a été souvent attaquée au cours des discussions précédentes a toujours été maintenue pour la raison suivante: il s'agit là de la disposition essentielle de la Convention Ce texte représente, en effet, une transaction entre les diverses opinions des Délégations des Gouvernements au C.I.T.E.J.A.: certains délégués demandaient que le titre fut obligatoire, d'autres réclamaient une sanction civile, d'autres encore, une sanction pénale. Le texte finalement adopté est d'inspiration britannique, il constitue une transaction acceptée par tous les membres de la Commission. Si ce texte tombe, il est à craindre que ce soit toute la Convention qu'il faille remettre en discussion.

M. YOUPIS maintient son amendement auquel il donne la forme définitive suivante: "Si le billet de passage ne contient pas l'une quelconque des mentions indiquées ci-dessus, le tran-

sporteur n'aura ce droit que si et dans la mesure où un dommage est causé de ce fait au voyageur."

L'amendement, mis aux voix, n'est pas adopté.

Le Président met aux voix le paragraphe 4, tel qu'il est rédigé. Le paragraphe 4 est adopté.

L'article 3, dans son ensemble, est alors adopté.

ARTICLE 2

Le Rapporteur signale qu'à l'article 2, il a été repris une modification de rédaction qui avait été admise. Le Sous-Comité de Rédaction a prévu une référence à une disposition annexe qui couvre la réserve formulée par le Gouvernement Britannique. Cette référence figure au bas du texte qui a été distribué.

Le Président estime alors qu'il est inutile de mettre: "Dans le protocole de signature figurera la réserve anglaise suivante . . ." Il suffira de mettre: "Le Gouvernement Brittanique déclare. . . ."

L'article 2, mis aux voix par le Président, est adopté.

ARTICLE 3

Le Rapporteur expose qu'à l'article 3 les mots "points d'arrêt prévus" ont été supprimés pour l'élégance de la phrase et il a été dit simplement "les arrêts prévus" (lettre c). La seconde modification concerne le dernier alinéa qui se lit ainsi:

"Si, pour un transport international, le transporteur accepte le voyageur sans qu'il ait été établi un billet de passage, ou si le billet ne contient pas les mentions indiquées ci-dessus, le contrat n'en est pas moins soumis aux règles de la présente Convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent en tout ou en partie sa responsabilité directe ou dérivée des fautes de ses préposés."

Aucune observation n'étant formulée, l'ensemble de l'article 3, mis aux voix, est adopté.

ARTICLE 4

Le Rapporteur indique qu'à l'article 4, il y a une modification du deuxième alinéa qui devient:

"La livraison des bagages au voyageur se fait valablement au porteur du bulletin."

Aucune observation n'étant présentée, l'alinéa 2, ainsi modifié, est adopté.

L'alinéa suivant doit se lire ainsi:

"Le bulletin de bagages est établi en deux exemplaires, l'un pour le voyageur, l'autre pour le transporteur."

A la lettre *c*), le texte est modifié comme suit: "ainsi que les arrêts prévus".

A la lettre *g*), le Sous-Comité de Rédaction a inséré l'ancien alinéa 2 de l'article 4 primitif.

Les trois alinéas suivants sont les mêmes: il y a une modification au dernier paragraphe. Le texte primitif disait par erreur: "Le transporteur n'en sera pas moins soumis. . . .", il est dit maintenant "le contrat de transport n'en sera pas moins soumis. . . ."

Ces différentes modifications mises aux voix sont adoptées par le Comité l'article 4 est adopté, en conséquence, dans son ensemble.

[Letterhead of Continental Translation Service, Inc.]

Certified translation from: French cts # 8435

CERTIFICATE OF ACCURACY

STATE OF NEW YORK)
) s.s.:
COUNTY OF NEW YORK)

On this day personally appeared before me Alvin Robert Blattner who, after being duly sworn, deposes and says:

That he is a translator of the French and English languages by profession and as such is connected with the CONTINENTAL TRANSLATION SERVICE, INC.

That he is thoroughly conversant with these languages.

That he has carefully made the attached translation from the original document written in the French language on the official paper of the CONTINENTAL TRANSLATION SERVICE, INC., and it consists of excerpts from the following:

1. International Conference On Private Aviation Law (October 27-November 6, 1925)
2. International Technical Committee of Legal Aviation Experts, April, 1927
3. International Technical Committee of Legal Aviation Experts, May, 1928
4. Y.J. Blanc-Dannery, Warsaw Convention (Paris 1933)

That the attached translation is a true and correct English version of such original, to the best of his knowledge and belief.

ALVIN ROBERT BLATTNER

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 2nd DAY OF JUNE, 1988

ALEXANDER A. ALKALAY

Alexander A. Alkalay
NOTARY PUBLIC, State of New York
No. 60-4679927
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires Feb 28 1989

MINISTRY OF FOREIGN AFFAIRS

INTERNATIONAL CONFERENCE

ON

PRIVATE AVIATION LAW

(OCTOBER 27-NOVEMBER 6, 1925)

PARIS

NATIONAL PRINTING OFFICE

1926

PRELIMINARY PROJECT

ARTICLE ONE

This agreement is applicable to any transport by aircraft of passengers of merchandise with or without transshipment, the points of departure and destination being situated in two different States.

However it does not apply to transportation reserved for the Postal Administration, even in a single one of the States concerned.

ARTICLE 2

International transportation shall be ascertained by a passage ticket or an international waybill mentioning the points of arrival and destination and, in need be, the points of transshipment.

This passage ticket shall always be made out by name and cannot be transferred. The waybill can be made out to a designated person, to order or to the bearer.

The waybill shall indicate in particular the nature and the weight of the objects transported, a declaration of their value, if it is made by the shipper, the price and method of determination of the price for transport and the place of payment.

ARTICLE 3

The carrier is liable for losses, damage and delays resulting from his personal faults and from equipment defects.

The regularly delivered administrative certificate establishes a presumption until proof to the contrary that the craft, at the origin, was in good condition of airworthiness.

The carrier also takes responsibility for faults committed by his employees upon arrival and departure, receiving, handling and delivery of the merchandise.

ARTICLE 4

The carrier is not responsible for losses, damage or delays:

1° In the event of force majeure, including air risks;

2° In the event of fault of the passenger or defect inherent in the merchandise;

3° In the event of unintentional faults committed by the pilot or technical crew in the operation of the aircraft and related operations.

ARTICLE 5

Under no conditions will the carrier's responsibility exceed the sum of ten thousand francs per traveler; however, by paying a special insurance premium, the traveler may have himself insured for a given sum against the carrier's risks.

In the transportation of merchandise, the carrier's responsibility may not exceed two hundred francs per parcel or unit, except in case of special declaration of value made by the shipper, who enjoys full discretion in this connection.

The above values are gold based values.

ARTICLE 6

Any clause in the ticket for passage or waybill tending to exonerate the carrier from the responsibility established in this agreement or to establish a limit of responsibility other than that determined by the previous article shall be null and void.

ARTICLE 7

In the event of death of a traveler transported, a suit for liability can be introduced only by the spouse and the heirs in direct line, whether legitimate or natural.

ARTICLE 8

The liability suit shall be brought, at the choice of the plaintiff, before the court of the place of departure or of the place of

arrival, or of the place where the accident occurred, if the aircraft has stopped on the way.

The procedure shall be settled by the law of the court instructed; however, no special formality may be imposed on the applicant by reason of his citizenship.

ARTICLE 9

The removal of merchandise, without protestation, by the consignee shall constitute a presumption that the merchandise has been delivered in good condition and in compliance with the transportation document. However, in the event of concealed damage or delay, the consignee shall have three days to protest.

Any protestation must be made by reservations entered in writing on the document or by another written document.

ARTICLE 10

The liability suit must be brought within one year from the aircraft's arrival at destination or its stop.

The causes of suspension and interruption of the prescription are determined by the law of the court instructed.

ARTICLE 11

The judgments pronounced, in presence of both parties or by default, by the competent judge by virtue of the provisions of this agreement are declared executory in the States which have signed this agreement, without need to review the entire situation.

ARTICLE 12

In the event of transport by successive aircraft with transshipment, the traveler may have recourse only against the carrier who has caused the accident through his fault.

In the same case, the shipper of merchandise may have recourse against "the first carrier and the consignee against"[1] the last, and both may furthermore take action against the carrier who has caused the loss or damage through his fault.

---

1 Note by the Secretary General. The words between quotation marks had been omitted in error from the proposed text distributed by the French Government; this omission was pointed out by the French Delegation during the conference.

REPORT

MR PRESIDENT,

GENTLEMEN,

The second Commission has been charged with studying the project submitted by the French Government concerning the liability of the air carrier. Presided by Professor COGLIOLO, it has held four sessions devoted to discussion of the texts; a restricted commission consisting of MM. RIPERT, MEGARRY, ARENDT, SCHREIBER and PITTARD has specified, in one session, the texts adopted by the second Commission.

We take this opportunity to very sincerely thank the authors of the French project; the text submitted to us has greatly facilitated our work and has served as a basis as well as a method for the delicate study of the rules of liability.

The text of the preliminary project submitted to you must be taken up in plenary discussion and the second Commission has no intention of imposing the result of its deliberations. It has formulated the legal provisions which you are at liberty to modify; however it wishes to present some brief comments on the reasons which dictated its preliminary project.

International transport.—This is obviously a form of transport which covers the territory of several countries. But this brings up a first question; is the international character determined by the *fact* or the *intent* of the parties? An aircraft leaving France and bound for Morocco flies over Spain; if it is forced to land in this latter country, does the voyage, by this fact, acquire an international character? An aircraft leaving France for England completes its voyage by landing in France; does the voyage fall within the concept of internal law by the fact that it did not pass from one country to another?

The Commission deems that for the application of an international agreement it was preferable to base oneself not on a possibly accidental or involuntary *fact*, but on the *intent* of the parties, in other words on the character that the parties have freely given to the transportation contract when it was concluded; this is the preoccupation which motivates paragraph 2 of Article 1.

A second question concerns the very nature of the transport. Most legislations allow that in contracts for profit the liability is greater than in not-for-profit contracts. It would therefore seem advisable to make a distinction between paid transportation and free transportation; but on the other hand this distinction does not exclude fraud and it is conceivable that the liability we wish to impose on the carrier may be canceled by more or less open collusion giving the transport a "free" character while the remuneration is stipulated in another form; finally, the carrier may have to transport passengers benefiting from free tickets.

The Commission deemed it wise to apply the same rule to all cases of transportation, whether there is remuneration or not.

The question was raised of friendly or sporting transportation, i.e. the case of a pilot who takes a friend aboard for an unpaid excursion.

This question was resolved by considering that, in this case, there is no transportation contract and in order to properly identify this difference, Article 2 has added the qualifier "commercial".

This does not mean that it is not useful to determine the liability of the carrier with no contract; but the Commission felt that this went beyond its limits and it proposes that the question be readdressed to the first Commission, which will enter it in the general schedule of aerial regulations.

Article 2 therefore embraces all commercial transportation, regardless of the nature of the aircraft, but it excludes postal transportation because this is governed by special agreements between States.

The term "corporation under public law" may appear unusual or constitute a neologism; the Commission submits it for your approval, in the absence of a better term, as including entities which are not private, i.e. the State, the towns, public administrations, etc.

Form of the contract.—Is the transportation contract conventual or formal? The unanimous opinion of the Commission is that the contract is conventual. But there is a great practical importance in specifying the conditions of transportation, in particular for eventual proof.

Thus we assumed that the transportation document provided in Article 3 demonstrates the existence of a contract but does not constitute one.

In practice it is necessary to establish a ticket for passage or a waybill without the omission of such document influencing the existence of the contract. The shipper must also be able to demand a receipt for the merchandise and, in this connection, it appears that the simplest way is to deliver a duplicate of the waybill certified by the carrier's signature or stamp.

These national laws must provide, by means of penal clauses, that these requirements be really sanctioned.

The *transportation document* is only an "instrumentum", but it has an undeniable importance. We therefore felt it necessary to specify its form, so as to facilitate the adoption of a single model by the various air transport agencies.

The statements to be contained in the transportation document are enumerated in Article 4; they are not limiting and it is hardly necessary to justify the need for them. We did not specify the documents which eventually accompany the waybill for, on the one hand, it is up to each State to list them and, on the other hand, to the carrier to refuse merchandise without proper papers. Here we submit only the rule that the waybill must mention, as a simple inventory, whatever documents are attached to it.

As in the case of rail transportation we assumed that the shipper is responsible for the accuracy of the statements entered in the waybill and that this responsibility will be attested by the shipper's signature affixed to the waybill.

Liability by reason of accidents, loss, delay, damage.—This is the main point of our project and we insist on repeating here that the text proposed to you may give rise to ample discussions.

The Commission asked itself which system of liability should be adopted: risk or fault. The general opinion is that, while third party civil liability must include application of the risk theory, on the other hand, in the liability of the carrier with respect to passengers and merchandise, the theory of fault must be adopted.

Having settled this first point, one may wonder on whom falls the burden of proof. It seemed fair not to impose this heavy burden on the injured party and the presumption of fault on the part of the carrier was assumed. But as this is only a presumption, the carrier has evidently the right to bring proof to the contrary and then the limit of the fault must be clearly established: where does it begin?

What can one expect from air transportation? A normal organization of its operation, a judicious choice of personnel, constant supervision of its agents and employees, a serious control of its equipment, accessories and materials used.

It must be assumed that whoever makes use of an aircraft is not unaware of the risks inherent in a mode of travel which has not reached the point of perfection the railways have acquired after one hundred years of operation.

It is therefore fair not to impose absolute responsibility on the carrier and to release him from any liability when he has taken reasonable and normal measures to prevent damage; this is the concern one would expect from a good manager.

In the present state of aeronautics it seems indicated to stop there while at the same time providing, for a somewhat distant future, a possible comparison with the liability of railways.

Still more delicate is the question of the carrier's liability with respect to his employees.

The text submitted to you includes the application of two principles. The first is of general application, namely that the master is responsible for the actions of his employees; the second, already adopted for the carrier's liability, is that there is no responsibility without fault, this fault being presumed until proof of reasonable care is established.

One may wonder whether the carrier's liability is not more extended thereby as concerns the employees than for himself; but this is only in appearance. In fact, in both cases, there is responsibility only if there is fault or, more exactly, if the presumed fault has not been canceled by proof that reasonable care has been taken to prevent the damage; but, as long as this proof is not brought, the presumption of fault remains and the master is responsible for the doings of his employees as well as for his own.

It appeared however necessary to bring a restriction to this responsibility; in any form of transportation one must consider the technical maneuvers which concern the actual operation of the aircraft, and the commercial transactions unrelated to aerial laws (packing, loading, arrival, unloading, storing the merchandise either before shipment, in case of interruption, or upon arrival until delivery).

While for these last operations there is no reason to release the carrier from his responsibility, on the other hand the carrier's responsibility can be eliminated in case of operational errors committed by his employees if he proves that he himself has taken all measures apt to prevent the damage; first of all, the crew must not be allowed to lose the feeling of its own responsibility, then it must be admitted that in its present state air traffic involves certain risks inherent in the very nature of this mode of travel (air risks) and that the shipper must take account of and participate in them.

Limit and exoneration of liability.—Articles 7 to 9 of the preliminary project constitute a whole and must be considered all together.

The Commission adopted the fundamental principle that the exoneration clause should be prohibited, for persons as well as for goods; this was to prevent agreements in which the parties might not be on an equal footing in freely giving their consent.

The shipper could find that transportation is denied him if he did not subscribe to an exoneration clause. On the other hand, account should also be taken of an important economic element, namely that the operator must be able to gauge the extent of the risks he assumes. It is to satisfy this double requirement that the preliminary project prohibit the carrier from eliminating or reducing his liability below a certain value and that, at the same time, it limit the carrier's maximum liability to 10,000 gold francs for persons and 200 gold francs per parcel. Naturally, the parties may increase the value of the passengers' lives and of the merchandise above the limit provided by the preliminary project, this by means of a special clause which can be treated on the one hand like insurance for persons and on the other hand like a declaration of interest upon delivery for merchandise (similar to the Berne Convention for rail transportation).

In this area a special question arose as concerns the action brought by legal claimants in case of death of the passenger. Do these act as heirs or "jure proprio"? There is a need to determine exactly the extent of the rights of the legal claimants for, depending on the national laws, the nature of their rights could lead to an interpretation differing from the legal basis and somehow cancel the limitation set by the preliminary project. Since it is almost impossible to set in a single formula the various legal concepts of the various States, it appeared simpler to specify in Article 8 that the claimants would be determined according to the national law of the deceased, but that the rights of these persons would be limited to the maximum sum allowed by Article 7.

In summary, thanks to this system, air transportation enjoys a protection which it is not permitted to eliminate and the carrier can clearly measure his risks and cover them, which is very important in the determination of transportation rates and hence for the development of air travel.

Competence and jurisdiction.—The general opinion of jurists in matters relating to the air is favorable to the extension of the rules of competence and no objection has been raised to the provisions of Article 8, paragraph 1, of the French draft; the Commission added the normal forum of the defendum ("forum rei").

As concerns the procedure, the wish was expressed that the applicant not be subjected to any particular formality and to no special charge (judicatum solvi security) by reason of his citizenship; this rule was incorporated in Article 10, paragraph 2, of the preliminary project.

Article 11 provides the general rule in the matter of transportation for what concerns the procedure of ascertaining the merchandise; it calls for no special comment.

Article 12 limits the duration of the time for recourse: the French draft established the prescription of one year and this appeared normal; but the diversity in legislations in the matter of interruption and suspension, as also the possible and pre-

sumable distance in the case of air transport, as finally the necessity, as concerns injuries and disability of the victims, to permit a more precise evaluation of the extent of the liability, all these elements led the Commission to increase the duration of the prescription to two years.

It was necessary to anticipate the occurrence of several successive transports in continuous transportation; in this case the liability must be settled differently, depending on whether a person or merchandise is concerned.

The normal principle is that responsibility is incumbent upon the carrier over whose system the damage occurred.

In the case of an accident involving a person, there is no reason not to apply the general rule and the suit must be directed against the carrier responsible for the accident. On the other hand the situation is quite different as concerns merchandise; first of all, it is not always easy to determine when a damage has occurred; secondly, each carrier can verify the apparent condition of the merchandise at the time he takes possession of it; finally, there is a mandate of which the merchandise is the object (which is not the case in the transportation of persons). This mandate creates a collective and solidary liability of the carriers; but in order to avoid any confusion and any abuse, Article 13 provides that the shipper shall address the first carrier, the consignee shall address the last, and either of them may address the carrier over whose system the damage has occurred.

To complete the rules concerning competence, the Commission wrote an Article 14 whose scope is fairly serious; this article prohibits any prorogation of forum and any agreement concerning the applicable law which has taken place at the time the transportation contract was concluded. The reason is easy to grasp: the preliminary project sets limits of liability, discards the clause of exoneration, determines the forum for the action as well as the time limit for prescription. All this forms a whole and would become useless if one of the terms could be modified by a particular agreement. It is therefore necessary to prohibit the prorogation of forum and the choice of applicable law just like the clause of exoneration is prohibited.

Application of the Agreement.—Article 15 provides that the Agreement shall apply in each contracting State to all international transports having their point of origin or destination within a contracting State.

A different opinion has been held, requiring for the application of the Agreement that both States be contracting States; but this opinion has been discarded for the following reasons:

1. The Agreement must be generalized as much as possible and for this it is preferable to extend rather than restrict its field of application.

2. For the reasons stated previously and by which the international character of the transport results from the intention of the parties, it suffices that the point of departure be located within a contracting State.

3. If the point of arrival alone is within a contracting State, it is very advantageous for the carrier as well as the client to know exactly the conditions under which the liability exists and is applied; this makes it possible for each to measure his risks, aside from the common law applicable in the place of arrival, said law being often unknown.

The Commission limited its study to the liability of the air carrier.

During its work it noted some points which appeared important but which fell outside of its competence:

1. This concerns determining the liability of the pilot or owner in cases where transportation does not constitute a contract (friendly or sporting transportation).

2. It also concerns the recommendation to insert in national legislations the guarantees apt to ensure application of Article 3.

3. One should also regulate points relating to air transport but which do not involve air risks at all: warehousing of merchandise, notification of arrival given to the consignee, home delivery, etc.

4. Finally and especially, the Commission expresses the wish that the Governments conclude as quickly as possible an agreement facilitating the execution of judgments rendered abroad.

The preliminary project submitted to you is but a discussion of the principles to be adopted, but if the Conference deems that it must give it the form of an international Convention, the clauses of duration of the Convention, denunciation, ratification, etc., should be added.

Your reporter apologizes for having held your attention for so long. He apologizes with a word of J.J. ROUSSEAU: I did not have the time to be more brief.

Paris, November 2, 1925

E. PITTARD
Reporter

EMBASSY OF THE
UNITED STATES OF AMERICA

Paris, January 12, 1926.

The Honorable
The Secretary of State,
Washington.

Sir:

With reference to the Department's telegraphic instruction No. 386 of October 22nd last, I have the honor to enclose herewith a copy of Major Yount's report regarding the "Conférence internationale de Droit privé aérien."

I am also enclosing a draft of an agreement with regard to this subject, which is the translation of the most important part of a document published by the Ministry for Foreign Affairs entitled "Conférence internationale de Droit privé aérien." This document is being forwarded under separate cover.

I have the honor to be, Sir,

Your obedient servant,

/s/ MYRON T. HERRICK
Myron T. Herrick

Enclosures and accompaniment:
As stated above.

In triplicate.

SCHEME OF AGREEMENT

. . . . . .

likewise desirous of finding a solution for the important question regarding responsibility of the conveying party in international transports by aerial machines, they have decided to enter into an Agreement and as a consequence have appointed their plenipotentiaries, to wit:

. . . . . .

who having become acquainted with their full powers, found in good and due form, have agreed to the following provisions:

ARTICLE 1.

For the purpose of the present Agreement, the term "international transport" refers to all transport in which, according to stipulations of the parties, the places of departure and arrival are situated in two different countries or States, whether there has been a transfer to another machine, interruption in conveyance or not.

ARTICLE 2.

The present Agreement applies to international transports by aerial machines of a commercial character, carried out with or without remuneration from the State and legal persons connected with public right.

Postal transports carried out under the control of international postal conventions do not come within the sphere of the present Agreement.

ARTICLE 3.

International transport shall be established by a travel-ticket or way-bill.

Upon request of the forwarding party, the carrier shall be bound to deliver him a duplicate of the way-bill duly certified.

Lack, irregularity or loss of the transport certificate does not cause prejudice to either the existence or validity of the transport contract.

ARTICLE 4.

The travel-ticket and way-bill shall mention in particular:

The places of departure and arrival.
The route followed.
The name and address of carrier.
Cost of transport, date and place of payment.
Indication of the legal limit of responsibility and, should the case arise, of the supplementary guarantee of the carrier, according to Article 7.
Place and date of issue.

Furthermore, the way-bill shall mention, in particular:

The name and address of the forwarding party and the consignee.
The length of time for transport, if it is stipulated.
Nature of the merchandise and style of packing.
Number and weight of packets, marks and figures indicated thereon.
Declaration of their value, if same is made by the forwarding party, in accordance with article 7.
Documents handed to the carrier to go with the way-bill.

The way-bill shall be signed by the forwarding party who shall be held responsible for the correction of the indications contained therein.

ARTICLE 5.

The conveying party is responsible for accidents, losses, damages and delays.

He is not responsible if he proves that he has taken reasonable steps to avoid damage; this proof is even admitted in the case when damage arises through a defect in the machine itself.

ARTICLE 6.

The conveying party is answerable for errors committed by his officials. Nevertheless, in case of faulty navigation, the conveying party shall not be held responsible if he provides proof as mentioned in the foregoing article.

ARTICLE 7.

Responsibility of the conveying party is limited to the sum of ten thousand francs per passenger. Nevertheless, upon special agreement with the conveying party, the passenger shall be able to fix a higher limit of responsibility.

In the conveyance of merchandise, the conveying party's responsibility is limited to the sum of 200 francs per package unless a special declaration of value has been made by the forwarding party, in which case the carrier shall be held liable for the value declared unless he is able to prove it greater than the real value at the place of arrival.

The foregoing values are gold values. They may be converted into every national currency in round figures.

ARTICLE 8.

In case of decease of a passenger carried, the law-suit regarding responsibility may be taken by the persons who have a right to take such action according to the law of the land of the deceased person but under the reserve of the limitation of responsibility provided for in the foregoing article.

ARTICLE 9.

Every clause which tends to exonerate the conveying party from his responsibility or to fix a limit lower than the one laid down in the present Agreement shall be null and void.

ARTICLE 10.

The law-suit regarding responsibility shall be taken, at the applicant's choice, either before the Tribunal sitting in the place where the defendant lives or before that at the place of departure or arrival or again before that at the place the accident occurred.

The procedure shall be governed by the law of the Tribunal to which application is made; nevertheless, no particular formality or guarantee shall be required of the applicant on account of his nationality.

MOTION.

After having drawn up, as an example, the list of questions, study of which should immediately follow examination of the problem regarding responsibility of the conveying party, by aerial machine, the Conference, considering the importance, urgency, complexity and technically judicial nature of these questions, expresses the wish that a special Committee of Experts be appointed as soon as possible, on which shall devolve the task of preparing the continuation of the work of the Conference.

This Committee shall be composed of a restricted number of members. Its regular headquarters shall be in Paris.

The Conference, therefore, prays the French Government to be good enough to get into touch with the Governments invited to this Conference to examine the decision to be given with regard to this recommendation.

The Conference expresses the wish that the first questions studied by this Committee be:

Damage caused by the aerial machines to property and persons on the ground.
Compulsory insurance.
Establishment of aeronautical registers: ownership of the aerial machine, real rights, mortgage.
Seizure.
Hiring of aerial machine.
Collisions in the air.
Legal status of the Commander of the aerial machine.
Way-bill.
Uniform regulations for determination of the nationality of the aerial machine.

IN FAITH OF WHICH the undersigned Delegates have drawn up the Present Protocol, certified true copy of which shall be remitted to each of the respective Governments.

Made in Paris in a single copy, November 6th, 1925.

INTERNATIONAL TECHNICAL COMMITTEE
OF LEGAL AVIATION EXPERTS

REPORT

ON THE 2ND SESSION

April 1927

Mr. COGLIOLO (Italy) formulates a criticism against paragraph 2 of Article 3, which is worded as follows:

"The absence, irregularity or loss of this document does not affect the existence nor the validity of the transportation contract".

It can be conceived that the loss of the air waybill does not affect the existence of the transportation contract, for the same holds true for the loss of a bill of exchange. But, as concerns the absence or irregularity of the letter of transportation, Mr. COGLIOLO, for a reason of form and for a reason of substance, doubts the utility of the article which states that this does not affect the existence or validity of the contract. The reason of form is that to say, in an article which settles the entire question, that its absence does not affect the existence nor the validity of the transportation contract is to singularly diminish the value of the letter of air transport. The reason of substance is that it is necessary to resolve the question, very frequent in maritime law as concerns the waybill. Mr. COGLIOLO wonders whether it would not be preferable to say that the carrier has the right to request the shipper to prepare the letter of air transport and that the shipper has also the right to request it but that, for international transports, an air waybill is mandatory.

Mr. DE VOS, Reporter, states that Mr. COGLIOLO's remark is precisely one of the points which raised the greatest difficulty during the Commission's examination. It appeared impossible for certain delegations, and particularly the British delegation, to introduce the obligation of the air waybill for all transports. This delegation considers it very difficult to have the British delegation accept the establishment of an adequate penal sanction corresponding to this obligation. The British experts pointed out that by not imposing the principle of obligation the practical result would nevertheless be the same. For them, it would be possible to arrive at the same result in the following manner:

1. The carriers must be urged to make use of an air waybill whenever they conclude an international transportation contract without, however, it being made illegal to do without one;

2. If the carrier makes use of a waybill, this document must contain (without however it being illegal to omit them) certain essential statements (statements numbered a) to g) in Article 7 of the draft Agreement);

3. The method to be adopted in order to achieve these two goals should be to make it materially advantageous for the carriers to make use of an air waybill containing the essential statements and to place them in a less favorable situation if they prefer to conclude a transportation contract without waybill or without the essential statements.

As a result, the British delegation proposed to the Commission:

a) that the agreement stipulate that if a transportation contract is concluded without the establishment of an air waybill containing the essential statements, the carrier shall lose the advantages conferred upon him by Articles 5, 6 and 7 of the preliminary project for the Agreement on liability (without however affecting the other provisions of said preliminary project) and that such contract, as concerns the topics to which the forementioned articles refer, is governed by common law;

   In this manner the sanction will be not only automatic, uniform and universal, but it will appear within the very framework of the Agreement.

b) that a model transportation document whose use would be recommended be attached to the Agreement.

It appeared to the Commission that this concept, obviously very different from Latin concepts, could be quite useful and that by accepting this minimum of obligations it was possible to achieve unanimity and to have the air waybill adopted.

On the other hand, if mention in the second paragraph of Article 3 of the word "absence" seems to indicate a contradiction and if, since it is a question of settling the existence of the air waybill, one should not speak of its absence, this is only an appearance. Retaining the word "absence" indicates simply that

the waybill is not mandatory and that the transportation remains in effect even without this document.

Mr. PITTARD (Switzerland) adds that if the word "absence" were not retained, the carrier would not issue a waybill in order to evade the Agreement; while, by retaining the word "absence", the carrier remains bound by the Agreement and thus this would cover the private transportation of an individual being transported exceptionally against remuneration.

Mr. RIPERT (France) points out that, in Article 16 of the draft Agreement, the Second Commission had provided a very severe sanction against whoever does not issue a waybill: this sanction consists in that the provisions of the Agreement apply to him in that they are unfavorable to him and that he will not be able to claim the exonerations contained in the Agreement.

The President proposes holding paragraph 2 of Article 3 until discussion of Article 16, just mentioned. It was decided accordingly.

The President then reads out Article 4, conceived as follows, pointing out that in the text finally adopted the term "waybill" will be replaced everywhere by the term "letter of air transportation".

"Any carrier has the right to request the shipper to prepare and deliver a waybill; any shipper has the right to request the carrier to accept such document."

Since no one asks to speak, this article is submitted to voice vote and adopted.

The President reads out Article 5, worded as follows:

"The waybill is prepared by the shipper in three copies and delivered together with the merchandise.

"These three copies have the same value.

"The first copy bears the mention "for the carrier"; it is signed by the shipper. The second copy bears the mention "for the consignee"; it is signed by the shipper and the carrier and it accompanies the merchandise. The third copy is signed by the carrier and delivered by him to the shipper after acceptance of the merchandise."

Since no one asks to speak, this article is submitted to voice vote and adopted.

The President then goes on to Article 6, worded as follows:

"The carrier has the right to request the shipper to prepare different copies of the waybill when there are several parcels.

"He can also have one or more copies prepared for the convenience of the transportation service, namely copies of stopovers, airports of origin and destination. These copies shall bear indication of their distribution; they do not have the value of the three copies of the waybill. Neither the originals nor the copies have the value of a waybill."

Mr. RIPERT (France) observes that the last sentence of the second paragraph of Article 6 does not appear to be satisfactory because it constitutes a negative formula. The idea it wants to express has been reproduced from the Berne Convention. In all the States there exists this concept of the waybill: that it actually represents the merchandise transported. Whoever holds the waybill in hand becomes the real owner of the merchandise. The merchandise is embarked on the ship, under the guarantee of the captain; it must arrive in a given port, so that it is actually lost to the shipper and really becomes available to the consignee. It was thought that such a concept could not be introduced in air transport because of the rapidity of transport of the merchandise and also because delivery to the consignee is not as well assured. It seems one should be able to indicate, in a positive form, that the letter of transport does not confer true ownership of the merchandise.

This proposal, submitted to voice vote, is not adopted.

The President asks whether anyone has other comments to make on Article 7.

Mr. LEBINSKI (Poland) calls the Committee's attention to the word "itinerary" in paragraph 6 of Article 7. The Legal Committee on Aviation, which has devoted much time to the legal terminology, agreed to the words "air route" instead of the word "itinerary". This designation could perhaps be taken in consideration, if need be.

The President declares that this interesting remark will be retained in the minutes.

Mr. DOBKEVIEGIUS (Lithuania) points out that, as concerns the word "quantity", it does not appear to be included in the other specifications of paragraph i) and he deems that it should be. On the other hand he wonders what is meant by the word "contenance" (capacity).

In Mr. PITTARD's (Switzerland) opinion the word "contenu" (contents) should have been used.

The President declares, with the consent of the Reporter, that the Editing Sub-Committee will revise the text as just mentioned.

He submits the entire Article 7 to voice vote; it is adopted.

The President reads out Article 8, worded as follows:

"The waybill must contain a clause stipulating that transportation is subject to the liability system established by the International Convention of November 6, 1925, as well as to its principal provisions."

Following an exchange of views between Mr. RICHTER (Germany), Mr. COGLIOLO (Italy) and the Reporter, it is decided that the text of Article 8 shall be worded as follows:

"The waybill must contain a clause stipulating that transportation is subject to the liability system established by the International Convention of . . . . . ."

The Secretary points out to the Committee that it has not yet appointed an Editing Sub-Committee and that it would be advisable to name one, as of now, if it is desired that this Sub-Committee meet and submit its text before the end of the session.

"The shipper is responsible with respect to the carrier for all damages which might result from the absence, inadequacy or irregularity of these documents.

"The carrier is not required to examine whether the papers are exact or adequate."

As no comment is made, this article is put to voice vote and adopted.

The President submits to the Committee Article 16, worded as follows:

"If a waybill containing all the statements indicated in Article 7, letters a) to g), and in Article 8 has not been delivered for an international transport, the carrier is no less subject to the rules of the International Convention on liability, but the carrier shall not be entitled to avail himself of the provisions of said convention which exonerate him of his liability or faults committed by his employees or which establish a limitation of liability."

Mr. YOUPIS (Greece) deems that the sanction provided by this article and which consists in depriving the carrier of all the benefits of the agreement is understandable for a powerful Company, but that for an individual performing an occasional international transport of merchandise, the absence of limitation of liability would, in his opinions, constitute an excessively severe sanction.

Mr. PITTARD (Switzerland) does not share this view. The limitation of liability has been considered in order to lead to the conclusion of an insurance; if an occasional carrier of merchandise wishes to become insured, he only has to limit his liability by means of a letter of transportation. Here is a very useful barrier forcing the carriers to fall within the framework of the agreement.

Mr. PINEDA DE MONT (Guatemala) supports this point of view.

The Committee, consulted by the President, decides to adopt the text of Article 16 as submitted.

The President points out to the Committee that paragraph 2 of Article 3, which had been held up, should now be reviewed:

"The absence, irregularity or loss of this document does not affect the existence nor the validity of the transportation contract."

The President points out that the Committee is in presence of two proposals:

ENCLOSURE (A) TO DESPATCH N°

INTERNATIONAL TECHNICAL COMMITTEE OF LEGAL AVIATION EXPERTS

PROVISIONAL REPORT

ON THE 3d SESSION

May 1928

CHAPTER II

Transport Documents—Section I—Tickets for Passage

ARTICLE 3

First paragraph

"In the transportation of passengers, the carrier is required to deliver a ticket for passage which must contain the following statements:

a) the place and date of issue;
b) the points of departure and destination;
c) the summary indication of the route to be followed (via) as well as the scheduled stopovers;
d) the name and address of the carrier(s)."

The Reporter states that the I.A.T.A. has formulated certain comments concerning this Article 3:

The first comment requests the elimination, in the ticket for passage, of the scheduled stopovers.

The Reporter reads out the arguments given by the I.A.T.A. on this subject:

"It is not suitable that the ticket for passage should also contain the scheduled stopovers. Nowadays there are already daily flights between two places with and without scheduled stopovers. On this subject we refer to the regular airline Deutsche Luft Hansa, between Berlin and Zurich, which flies every day in part with stopovers at Halle, Leipzig, Erfurt and Stuttgart, and in part without stopovers. Air traffic must attempt to organize in equal fashion, and in alternation, direct communications and communications with stopovers. Although the ticket for passage regularly indicates a fixed hour, it however frequently happens that changes are made. Since many stations are quite overloaded it cannot be guaranteed that, in the event of such changes, stopovers as indicated in the schedule will not be added or crossed out.

"According to the terms of Article First, it matters only to mark on the ticket for passage the stopovers indicated in the

schedule, which are located in a country in which the point of departure and the point of arrival do not appear at the same time. As a result, if now scheduled stopovers must be mentioned in the ticket for passage, this can concern only the last stopping points.

"By submitting this proposal we would like that consideration be given to the fact that airlines do not maintain in their respective stations as much personnel as, for example, railroads and shipping companies. This is why it is necessary that the personnel be relieved of any but the most essential paper work. This is particularly important if some prejudice can result for the airline from the incorrect delivery of a ticket for passage."

The I.A.T.A. has formulated a second proposal: the addition of the baggage check number to the ticket for passage.

The first of these proposals: elimination of letter c), has already been studied previously by the Experts, who have discussed and rejected it; therefore the Reporter takes no account of it. The second proposal results from practice and appears interesting: as Article 4 provides for the number of the ticket for passage, it would be possible to expect that the number of the baggage check would be entered in the ticket for passage. However, from the point of view of the convention, this proposal has no legal interest and it is useful only for the carrier; thus he will enter this statement in the ticket, whether the Agreement says so or not.

The President asks the Committee whether it intends to adopt this suggestion which does not appear to have a place in the text of the Agreement.

As no other remark is made regarding the first paragraph, and since the I.A.T.A. suggestion is not adopted, the first paragraph of Article 3 put to voice vote is adopted.

Paragraph 2

"The ticket for passage must furthermore contain a clause stipulating that transportation is subject to the system of liability established by this Agreement".

Mr. PITTARD points out that it was understood the model tickets would be attached to the Agreement, as was done for the

Berne Convention on railroads. These models must include the minimum of indications, the Companies being free to add all the ones they deem useful.

The Reporter indicates that this is formally provided in Article 19.

Paragraph 2 is then put to voice vote and adopted.

Paragraph 3

"The absence, irregularity or loss of this transport document does not affect the existence nor the validity of the transportation contract."

No remark having been made, Paragraph 3 is adopted.

Paragraph 4

"If, for an international transport, the carrier accepts the traveler without a ticket for passage containing the above statements having been prepared, the transportation contract will nonetheless be subject to the rules of this Agreement, but the carrier shall not have the right to avail himself of the provisions of this Agreement which exclude all or part of his liability, whether direct or derived from the fault of his employees."

Mr. YOUPIS feels compelled to point out that the sanction provided in this paragraph is too severe in the case of a simple omission. It is said, in fact, "without a ticket for passage containing the above statements having been established . . .". The absence of indication of the place of issue or of the date, for example, will deprive the carrier of the right to avail himself of the provisions exonerating him of liability. He asks that the following sentence be added at the end of paragraph 4: "If this ticket for passage does not contain one of the statements indicated above, the carrier shall have this right only to the extent that no damage has been caused to the passengers".

Mr. PITTARD feels that the Convention must defend itself. This question has been studied thoroughly. If there is omission of one of the required statements, then there is a professional fault and it must involve a sanction.

The Reporter adds that, as just indicated by Mr. PITTARD, long prior discussions have led to the text now being proposed; the only practical sanction which has been found is the one deriving from the Agreement itself. These omissions which Mr. YOUPIS considers as slight are not so in fact: All that are indicated as mandatory statements are highly important. He points out that Prof. COGLIOLO had previously said on this subject:

"A public transportation service must always have its papers in order and it must be dealt with more severely than for the simple oversight committed by a passenger."

Mr. YOUPIS insists on finding that the present text is too severe and that it could be attentuated in the sense indicated by him when no one has been injured.

The Reporter retains the Commission's text. He points out that this provision, which has often been attacked during previous discussions, has always been maintained for the following reason: this concerns the essential provision of the Agreement. This text in fact represents a compromise between the various opinions of the Government Delegates to the C.I.T.E.J.A.: certain delegates asked that the document be made mandatory, others called for a civil sanction, yet others, a penal sanction. The text finally adopted is British inspired; it constitutes a compromise accepted by all members of the Commission. If this text fails, it is to be feared that the entire Agreement will have to be renegotiated.

Mr. YOUPIS maintains his amendment, to which he gives the following final form: "If the ticket for passage does not contain any one of the statements indicated above, the carrier shall have this right only if and to the extent that a damage is caused thereby to the passenger."

The amendment, submitted to voice vote, is not adopted.

The President puts paragraph 4, as it is worded, to a voice vote. Paragraph 4 is adopted.

Article 3 is then adopted in its entirety.

ARTICLE 2

The Reporter points out that in Article 2 there is a modification in wording which had been accepted. The Editing Sub-Committee has provided a reference to a related provision which covers the reservation formulated by the British Government. This reference appears at the bottom of the text which was distributed.

The President then deems that there is no need to say: "In the protocol for signature will appear the following British reservation . . .". It will suffice to say: "The British Government declares . . ."

Article 2, put to voice vote by the President, is adopted.

ARTICLE 3

The Reporter says that in Article 3 the words "scheduled stopping points" have been eliminated for the sake of style; the text reads simply "the scheduled stops" (letter c). The second modification concerns the last indent which reads as follows:

"If, for an international transport, the carrier accepts a traveler without a ticket for passage having been established, or if the ticket does not contain the statements indicated above, the contract is nonetheless subject to the rules of this Agreement, but the carrier shall not have the right to avail himself of the provisions of this Agreement which exclude all or part of his liability, whether direct or derived from faults committed by his employees."

No comment being made, the entire Article 3 is put to voice vote and adopted.

ARTICLE 4

The Reporter indicates that in Article 4 there is a modification in the second paragraph which becomes:

"Delivery of baggage to the traveler is validly done to the bearer of the [baggage] check."

No comment being made, paragraph 2, thus modified, is adopted.

The following paragraph must be read as follows:

"The baggage check is made out in two copies, one for the traveler, the other for the carrier."

Under letter c), the text is modified as follows: "as well as the scheduled stops".

Under letter g), the Editing Sub-Committee inserted the former paragraph 2 of the original Article 4.

The following three paragraphs are the same: there is a modification in the last paragraph. The original text said in error: "The carrier shall nonetheless be subject . . ."; it now reads: "The transportation contract shall nonetheless be subject . . ."

These different modifications put to voice vote are adopted by the Committee. Article 4 is therefore adopted in its entirety.

* * * * *

Excerpts from "Second International Conference on Private Aeronautical Law Minutes, Warsaw, 1929" (R. Horner & D. Legrez trans. 1975)

SEVENTH SESSION

October 10th, Evening

The session is open at 6:45 p.m., Mr. Lutostanski presiding.

We pass to Article 3 which is the first of the following chapter. It is thus conceived:

CHAPTER II—DOCUMENTS OF CARRIAGE

SECTION I—PASSENGER TICKET

Article 3

1) In the carriage of travelers, the carrier shall be required to deliver a passenger ticket which must contain the following particulars: (a) the place and date of issue; (b) the points of departure and of destination; (c) the contemplated stopping places, provided that the carrier may reserve the right to modify the stopping places in the case of necessity, and without this modification having the effect of depriving the carriage of its international character; (d) the name and address of the carrier or carriers; (e) the indication that the carriage is subject to the system of liability set forth by the present Convention.

2) The absence, irregularity or loss of the passenger ticket shall not affect either the existence or the validity of the contract of carriage, but shall nonetheless be subject to the rules of the present Convention. Nevertheless, if the carrier accepts the traveler without having delivered a passenger ticket, he shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.

MR. YOUPIS (Greece): In the first paragraph of this article, it is said: "the indication that the carriage is subject to the system of liability set forth by the present Convention".

This particular appears as well in Article 8, as regards the waybill; but in Article 4, paragraph 2, letter (h) it is said: ". . . to the system of the present Convention".

I believe that one should take a uniform formula.

MR. GIANNINI, President of the Committee: As I warned you, as we proceed in examining each article, we will eliminate the minor errors which may have slipped in. We have tried to use uniform language, but if something escaped us, I would be obliged to you to note it. Naturally, the formula must be the same throughout.

THE PRESIDENT: No one asks the floor? . . . I put Article 3 to a vote.

(Adopted).

REPORT

presented in the name of the
International Technical Committee
of Aeronautical Legal Experts
by Mr. Henri De Vos, Reporter,

on the Preliminary Draft of a Convention
relating to documents of air carriage and
to the liability of the carrier in
international carriage by aircraft.

The International Technical Committee of Aeronautical Legal Experts, during the course of its meeting in Madrid in May, 1928, definitively rendered the Preliminary Draft of a Convention annexed hereto whose object is: certain rules relating to documents of air carriage–passenger ticket, baggage check, an air waybill, as well as relating to the liability of the air carrier and to the limitation of this liability.

This draft is the end result of numerous preparatory studies which have been expressed in eight previous texts concerning either the liability of the carrier or the waybill.

A first preliminary draft of a Convention fixing the bases of the liability of the carrier and of the limitation of this liability as regards air carriage had been presented by the French Government at an international conference, which was held in Paris on October 26, 1925.

This conference set up a committee which reshaped this text. The conference was presented on November 3, 1925 with the Preliminary Draft thus amended. New modifications thereto were made by the conference on November 6, 1925.

Moreover, a first preliminary draft on the waybill was presented to the Second Committee of the CITEJA (set up in the meantime) which met in Paris on March 30, 1927.

Following the examination of this draft by the CITEJA in April, 1927, this text was slightly amended.

The CITEJA, having decided during the course of this same meeting to examine the possibility of joining in a single convention, the two matters—liability and documents of carriage—a new preliminary draft was presented in June, 1927.

This text was modified during deliberations of the Second Committee of the CITEJA which met in Brussels from November 7 to 10, 1927.

A new meeting of this committee took place in Paris on March 21 and 22, 1928, during the course of which the previous texts were amended.

Finally, they came back before the CITEJA which put them definitively in order at Madrid in May, 1928.

* * *

Before examining the articles of the preliminary draft, it is important to bring out that in this matter an international agreement can only be reached if it is limited to certain determined problems. The text applies, therefore, only to the contract of carriage in its formal appearances first of all, and in the legal relationships which arise between the carrier and the persons carried or the people who ship. It regulates no other question that transport operations could give rise to.

All the same, the Convention does not set up a system of compulsory insurance.

All the same again, the limitation of liability being fixed from the point of view of the carrier, the question of abandonment is not raised.

As it's a question of liability engaged at the time of a specific contract of carriage, the Convention, of course, only applies to damage caused by the equipment assigned to *this* carriage for the execution of the contract.

It was important to give these first limiting indications regarding the matter forming the object of the Convention before examining the limits of the scope of application which it contains in its first Article.

The draft appears, in effect, as follows:

–A Chapter I sets forth the object of the Convention and the precise limits of its application.

-A Chapter II contains in four sections the essential rules concerning the documents of carriage: passenger ticket, baggage check and air waybill.

-A Chapter III includes provisions relating to the liability of the carrier and to the limitation of this liability.

-A Chapter IV includes two general provisions.

CHAPTER II—DOCUMENTS OF CARRIAGE

SECTION 1—PASSENGER TICKET

A special document is provided for carriage of passengers. This document is necessarily different from those used for carriage of baggage and the circulation of goods.

This baggage ticket must contain only a minimum of particulars.

Moreover, the sanction provided for for carriage of passengers without a ticket or with a ticket not conforming to the Convention is identical to that provided for, for carriage of baggage and goods.

This sanction formula constitutes a compromise between the different opinions of the governmental delegations to the CITEJA of which some asked that the document of carriage be compulsory certain of them with civil sanctions and others with penal sanctions, and others defended the principle of freedom of contract.

SECTION II—BAGGAGE CHECK

The same observation as for passengers applies to baggage. A special article concerned the baggage check.

It is provided that the carrier can validly deliver baggage to the bearer of the check.

But this check does not constitute a bearer instrument; the carrier can, if he has doubts on the subject of its ownership, refuse delivery, without proof, of the baggage. The traveler can moreover, demand, in the case of loss of his check, the production of the second copy in order to prove he is the owner. Finally, the liability of the carrier for baggage is a common

law liability, and the proof of fault falls upon the owner of the baggage.

SECTION III—AIR WAYBILL

The air waybill witnesses the international carriage of goods; it is but an instrument of proof.

The Convention does not impose the obligation of having a waybill; but, as soon as one exists, the provisions of the Convention apply to it.

As it is said above, this formula is a compromise for the purpose of arriving at an unanimous adoption of rules of the Convention, certain members being of the opinion that carriage should be witnessed compulsorily by an air waybill, other deeming that in this matter it is better to leave the parties free to safeguard their interest.

The guarantee for the protection of these interests is found in the right recognized in the carrier to demand from the consignor the making out and the delivery of an air waybill, and in the right recognized in the consignor to demand from the carrier the acceptance of such a document, this acceptance leading, besides, to the obligation of the carrier to hand over to the consignor the waybill signed by him.

The waybill is made out in three copies which have the same value, and are destined to the three persons directly interested in the carriage; the consignor, the carrier and the consignee.

The particulars appearing on the waybill must be given by the consignor, who alone can supply them and guarantee their accuracy. In fact, it will not always be the consignor who will make the material entries on the document: It will often be the agent of the carrier himself, but, in this case, this agent will act on behalf of the consignor.

The particulars indicating that a document covering international carriage is involved, that is to say, those provided for under letters (a) through (f), are indispensable from the point of view of the performance of the Convention.

It is the same for the particulars found at letter (g): the nature of the goods, because prohibitions can be decreed by different countries regarding the entry or exit of goods.

The other particulars from (h) to (p) present an undeniable usefulness, but their omission cannot be, according to certain national ideas, validly sanctioned. It is highly recommended that the waybill bear these particulars, but their insertion will depend above all on the interest itself which the parties have in indicating them on the document constituting the document of carriage.

These particulars, besides, are not exclusive. It can be useful, for example, in certain cases, to give an indication of the aircraft which will transport the goods.

The waybill must not, however, be confused with the aircraft log book, which will be able to usefully provide information on changes of destination, transshipments, operations performed en route, thus facilitating the solution of litigation on the subject of non-delivery of goods, of their return to the consignor, etc., but the regulation of which finds no place in the present Convention.

Moreover, to provide for the case of combined carriage, it has been provided that the document of carriage could contain clauses relating to other modes of carriage, provided that the provisions of the Convention be respected as to the air leg.

The consignor is liable for the accuracy of the indications and declarations concerning the goods. He must suffer the consequences of any irregularity or inaccuracy in this regard.

One of the original texts provided a special measure for intentional false declarations of a nature of the goods. In this case, the carrier would not have been liable for the loss or damage. This measure was, however, limited by the possibility for the consignor to prove that his false declaration was not of a nature so as to cause the carrier any damage whatsoever.

This provision was eliminated: Coming from common law, it seemed too severe for the consignor, the sanction of the first paragraph of Article 16 being sufficient, anyway, but it is understood that the consignor answers for all consequences of his declarations.

The contract of carriage is concluded at the time when the carrier accepts the goods: if they are accepted without a waybill, the contract will nonetheless be valid. These principles of com-

mon law, which appeared in the first article, were not retained, because they are self-evident.

The waybill is *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and the conditions of carriage.

The carrier has the right to verify the declarations relating to the quantity, the volume, and the condition of the goods. It's only when he has verified these declarations that they constitute proof against him. A contradictory and precise verification is, however, useless regarding the particulars relating to weight, dimension, number and packing, as well as to the apparent condition of the goods; even without this verification, the carrier is deemed to have recognized the accuracy of these declarations, since he can ascertain errors immediately, point them out, or make his reservations.

The consignor has the right to dispose of the goods before they have arrived at the destination and before the waybill has been delivered to the consignee. If the carrier complies with the orders of the consignor without requiring the copy of the waybill delivered to the latter, he will be, according to the provisions of the Bern Convention on the carriage of goods by railroad, liable for the damage which could be caused by this fact to all interested parties.

The Convention provides no express provision relating to waybills "to order" or "to the bearer". The present texts do not exclude the possibility of recognizing such documents. Thus, at Article 18, was put "the name and the address of the consignee, if necessary". Eventually, in the case of carriage "to the bearer", the name and address of the consignee would be omitted; but no provision concerning the system to be applied in this case was provided for, because the question is neither theoretically or practically ripe.

The carrier is required to deliver the waybill to the consignee at the place of destination and to deliver the goods to him.

To this obligation corresponds the consignee's right to receive the document destined for him and to have the goods delivered.

He will be able to pursue his right in the case where the goods do not arrive at their destination and, in accordance with Article 16 of the Bern Convention, he will consequently be able to act at the expiration of a period of seven days after the goods should have arrived.

On the subject of this period, it is better to point out that, when in the Convention it is a question of days, ordinary days and not working days are involved.

The right to receive the document and the goods leads necessarily to the obligation of paying the amount of the debts which result from the conditions and the charges for the carriage indicated in the waybill, and notably the amount of the indicated price of the goods if the shipment is made C.O.D.

As to rights of disposal and delivery of the goods, Articles 12, 13, 14 and 15 add specifications to prior texts on the subject of the conditions to the exercise of these rights.

It was stipulated, notably, that the right of the consignor ends at the moment where that of the consignee begins, but if the consignee refuses the waybill or the goods, the consignor resumes his right of disposal; that the carrier must notify the consignee of the arrival of the goods within a period of twenty-four hours; that the consignor and the consignee can pursue all the rights recognized in them, whether they act in their own interest or in the interest of others, that these articles do not prejudice either the relations between the consignor and the consignee, or the relations of third parties whose rights arise either from the carrier or from the consignee.

The right to deviate from the provisions of these articles is recognized, but any clause which deviates therefrom must be inserted in the waybill.

As to sanctions, it has already been pointed out that the difficulty for certain national ideas to provide adequate measures for the purpose of insuring the observance of certain provisions of the Convention led to the adoption of a system which appears eminently practical and which consists in the eventual loss

of the advantages which are conferred upon the parties by certain articles of the draft on the liability of the carrier.

The parties have, therefore, great interest in using a waybill containing the essential particulars.

However, it seemed opportune to remind one at the end of the Convention that all these provisions left entirely intact the right of all carriers to refuse to accept any carriage whatsoever.

B.

PROPOSALS OF THE DELEGATIONS

GREEK REPUBLIC

Article 3—Section 4

Conforming to Article 22 of the draft, in the case of an accident, the carrier can escape his liability if he proves that he and his servants have taken reasonable measures to avoid the damage, or that it was impossible for them to take them.

However, according to Article 3, the carrier loses this advantage if the passenger ticket does not contain the particulars indicated in this article.

It is possible, in effect, that by simple negligence the carrier has omitted to mention in the passenger ticket the place of issuance, or the point of departure, or his name and address; or even that he keeps his former address in the ticket, or finally he does not point out an intermediate stop.

These are, in general, omissions without great importance for the party, because it is known or easy to establish that the ticket was issued and the departure took place from the aerodrome of such and such a city, that the aircraft is owned by such company, or because the intermediate stop can be without interest for the contracting party.

One can wonder why such an omission, without importance for the majority of cases, should lead to such a serious sanction in every case as that provided for by Article 3, paragraph 4.

If the omission is without interest for the other party, and if it causes him no damage, how could one justify this severe sanction on the shoulders of the carrier?

This sanction is justified only in the case where the omission of a particular would have engendered damage to the passenger, as it can happen in certain circumstances.

But who will judge if there is damage to the other contractant because of this omission and if the damage is such that the carrier must be made to lose the option of escaping by proof that he has done what is necessary to avoid the accident? Naturally

there is only the court, seized with the affair who would be able to judge this question.

It's for these reasons that we propose to modify paragraph 4 of Article 3 of the draft as follows:

"If, for international carriage, the carrier accepts a traveler without having made out a passenger ticket, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability or that derived from the errors of his servants.

"If the passenger ticket does not contain one of the particulars hereabove, the carrier shall be deprived of this right in the case where, according to the judgment of the court, damage would be caused to the other party by this fact."

For the same reasons one should modify in the same sense paragraph 7 of Article 4 for the baggage check and Article 17 for the waybill.

JAPAN

Articles 3 and 4

It's not clear from the text, in particular from Article 4, if the particular of the clause concerning the liability of the carrier is compulsory, as it is provided for in Article 17 for goods. The Japanese Delegation thinks that this particular should be compulsory.

Article 4

It would be advisable as well to insert always particular (g) relating to delivery of baggage.

A-94

YVONNE-J. BLANC-DANNERY

Licenciée ès-Lettres
Docteur en Droit

LA CONVENTION DE VARSOVIE ET LES RÈGLES DU TRANSPORT AÉRIEN INTERNATIONAL

PARIS
A. PEDONE, ÉDITEUR
LIBRAIRIE DE LA COUR D'APPEL ET DE L'ORDRE DES AVOCATS
13, Rue Soufflot, 13

1933

SECTION I

Le billet de passage

Le billet de passage (3) est le titre constatant que le prix du transport a été versé par le voyageur. Suivant l'usage répandu dans les compagnies aériennes, il est établi en seul exemplaire détaché d'un carnet à souches. Comme il est appelé, le cas échéant, à apporter la preuve des conditions du transport, il doit contenir un certain nombre d'indications, savoir:

a) Le lieu et la date de l'émmision;

b) Les points de départ et de destination;

c) Les arrêts prévus, sous réserve de la faculté, pour le transporteur, de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;

d) Le nom et l'adresse du ou des transporteurs;

e) L'indication que le transport est soumis au régime de responsabilité établi par la présente Convention.

Ces mentions ont été intentionnellement réduites au minimum, afin de simplifier les formalités à remplir et de faciliter l'administration des transports aériens. "Les compagnies aériennes ne disposant pas dans les stations respectives d'un personnel aussi nombreux que les compagnies de chemin de fer ou maritimes, il est nécessaire que le personnel soit déchargé de tout travail d'écritures qui n'est pas absolument indispensable" (4). De son côté, le passager trouve sur son billet les précisions relatives à l'exercise éventuel de l'action en responsabilité et il est suffisamment renseigné sur les conditions du voyage qu'il entreprend. Il n'eut donc pas été adroit de s'appesantir sur des points de détail. C'est pourquoi, les propositions d'insérer le prix du transport, les noms, adresse, nationalité des voya-

(3) Loi du 31 mai 1924, art. 46: "Le contrat de transport des passagers doit être constaté par la délivrance d'un billet."

(4) Argument de l'I.A.T.A. pour demander le retrait de la mention des arrêts prévus.

geurs furent écartées. L'exigence des arrêts prévus et l'indication de la voie à suivre ont été atténuées par la possibilité pour le transporteur: "de stipuler qu'il pourra les modifier en cas de nécessité". L'Association Internationale du Trafic Aérien (I.A.T.A.) avait beaucoup insisté sur la difficulté de les garantir. Comme il est cependant utile qu'un certain itinéraire soit fixé, l'adoption de cette réserve était le moyen terme cherché.

Les délégués se sont demandé si le billet de passage serait cessible ou non. Il était malaisé de lui conférer un caractère aussi absolu, car l'un et l'autre ont des avantages et des inconvénients. Comment, en effet, empêcher le voyageur d'envoyer une tierce personne louer sa place? Ce qui ne serait pas possible avec un titre de transport nominatif. D'autre part, il y a grand intérêt à connaître les noms et adresses des passagers. C'est en quelque sorte leur assurer la propriété du billet. Le projet d'ajouter dans un alinéa 4 une mention portant que "sur la demande, soit du transporteur, soit du voyageur, le billet pourrait être nominatif et porter le nom et l'adresse du voyageur" fut repoussé.

Les parties demeurent donc libres de stipuler l'incessibilité. En pratique, les difficultés s'aplaniront, car les compagnies prennent généralement soin de faire signer les billets au moment de la délivrance. De plus, les listes réglementaires de bord (5) qui doivent forcément contenir les indications se rapportant à chaque passager seront, à l'occasion, utilement consultées. En tous cas, les mentions du billet de passage ne sont pas limitées, les contractants pourront toujours les compléter par d'autres, s'ils le jugent nécessaire.

Sanction

Le jeu de la sanction est très simple. L'article 3 ne fait aucune distinction entre les mentions: "le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes". Autrement dit, toutes sont obligatoires. Faute par lui d'accepter un voyageur sans qu'il ait été établi de titre de

(5) Loi française du 31 mai 1921, article 46: "Il est dressé une liste nominative des passagers embarqués dont le duplicata doit se trouver à bord de l'aéronef et être communiqué sur leur demande aux autorités chargées de la police de la circulation."

transport ou si celui-ci est irrégulier—c'est-à-dire s'il ne porte pas les mentions requises—le transporteur est le seul puni: "Il perd le droit de se prévaloir des dispositions qui excluent ou qui limitent sa responsabilité." Comme le billet de passage n'est qu'un instrument de preuve, le contrat par lui-même n'est aucunement affecté de son absence, de son irrégularité ou de sa perte. Il n'en demeure pas moins valable et soumis aux règles de la présente convention.

Le transporteur ne doit donc pas manquer de se conformer à ces prescriptions.

DOCTRINE

SECTION I

The Passage Ticket

The passage ticket (3) is the document ascertaining that the price of the voyage has been paid by the traveler. According to usage common among airlines, it is made out in a single copy detached from a stub booklet. Since it may eventually have to serve as proof of the conditions for transportation, it must contain a certain number of indications, namely:

a) The place and date of issue;

b) The points of origin and destination;

c) The scheduled stops, subject to the carrier's option to stipulate that he may modify them, if necessary, without this modification altering the international character of the transport;

d) The name and address of the carrier(s);

e) Indication that the transport is subject to the system of responsibility established by this Convention.

These statements have intentionally been reduced to a minimum in order to simplify the formalities to be accomplished and to facilitate the administration of aerial transportation. "Since airlines do not maintain in the respective stations as large a staff as railways or shipping lines, it is necessary that the personnel be relieved of any paper work which is not absolutely essential" (4). On his part, the traveler finds in his ticket details on the eventual exercise of the action in liability and he is sufficiently informed on the conditions of the trip he is undertaking. Therefore it would not have been desirable to insist on points of detail. This is why the suggestions of inserting the price of the passage, the names, address and nationality of the travelers were rejected. The requirements concerning scheduled stops and indication of the itinerary were attenuated by the possibility for the carrier: "to stipulate that he may modify them if necessary". The International Association of Air Traffic (I.A.T.A.) had greatly insisted on the difficulty of guaranteeing them.

However, as it is useful that a certain itinerary be established, adoption of this reservation was the compromise sought.

The delegates wondered whether or not the passage ticket would be transferable. It is rather difficult to give it such an absolute character, for one or the other has both advantages and disadvantages. In fact, how could one prevent a traveler from having a third party book his place? This would not be possible with a travel document made out by name. On the other hand, it is quite advantageous to know the names and addresses of the passengers. This, in some way, guarantees them ownership of the ticket. The proposal to add in a paragraph 4 a mention that "upon request by either the carrier or the passenger, the ticket could be made out by name and bear the name and address of the traveler" was rejected.

The parties therefore remain free to stipulate non-transferability. In practice the difficulties will be smoothed, for airlines will generally take care to have the tickets signed at the time of delivery. Moreover, the mandatory manifests (5) which must contain the indications pertaining to each passenger can always be consulted, if necessary. In any event, the indications in the passage ticket are not limited; the contracting parties may always complete them if they deem it necessary.

Sanction

Application of the sanction is very simple. Article 3 makes no distinction whatever between the statements: "The carrier is required to issue a travel ticket which must contain the following indications". In other words, all are mandatory. Should he refuse to accept a traveler without a transportation document having been prepared or if same is irregular—i.e. if it does not contain the required statements—the carrier alone is punished: "He loses the right to claim the provisions which exclude or limit his liability." As the passage ticket is only an instrument of proof, the contract itself is in no way affected by its absence, irregularity or loss. It is no less valid and subject to the regulations of this Convention.

The carrier must therefore not fail to comply with these instructions.

* * *

THE NATIONAL LAW JOURNAL

1988 The New York Law Publishing Company

VOL. 10—No. 37 MONDAY, MAY 23, 1988

Air Crash Death Average: $362,943

BY ANDREW BLUM
National Law Journal Staff Reporter

THE AIRLINE industry paid an average of $362,943 for each person killed in major plane crashes between 1970 and 1984, according to a Rand Corp. study obtained by The National Law Journal.

And that figure has been rising dramatically in the 1980s, according to an NLJ examination of the figures included in the study for this decade and of more recent crash award trends.

The Rand study, still in its drafting stages, is said to be the most comprehensive look ever at the amount of money paid out as a result of air-crash disasters. It was financed in part by the Aerospace Industries Association of America (AIA), which was a proponent of a no-fault compensation system at the time it was commissioned, but which has—for now—changed its mind.

Information about the study's contents comes at a time when unprecedented scrutiny is being given to two of its topics: airline safety and the civil litigation system. And one of its conclusions is that there was little relationship between pay-outs and safety expenditures in the time period studied.

The report looks at 2,228 passenger and ground deaths in 25 major crashes. Among its findings:

Airline Fatalities Cost $1 Billion in 14 Years

Dramatic Rise

Further investigation by the NLJ based on the Rand research shows the average amount rose to about $500,000 for victims in crashes after 1980. But many attorneys point out that wrongful-

death compensation appears to have risen drastically in crashes in the last five years, a fact that will make the Rand study almost outdated upon its completion.

The study—made with the cooperation of plaintiffs, defendants and insurers—was financed by Rand and a $400,000 grant from AIA.

25 Accidents in the Study

Date	Airline	Location	Deaths	Injuries
11/4/70	Southern	Kenova, W.Va.	70	0
11/27/70	Capitol	Anchorage, Alaska	46	85
6/6/71	Air West	Duarte, Calif.	44	0
9/4/71	Alaska	Juneau, Alaska	104	0
12/8/72	United	Chicago	42	19
12/20/72	North Central	Chicago	10	13
12/29/72	Eastern	Miami	95	65
7/23/73	Pan Am	Tahiti	68	1
7/31/73	Delta	Boston	83	0
12/17/73	Pan Am	Rome	28	24
1/31/74	Pan Am	Pago Pago	87	4
4/22/74	Pan Am	Bali	96	0
9/8/74	TWA	Ionian Sea	79	0
9/11/74	Eastern	Charlotte, N.C.	70	8
12/1/74	TWA	Mt. Weather, Va.	85	0
6/24/75	Eastern	New York	107	9
4/27/76	American	St. Thomas	36	53
3/27/77	Pan Am	Tenerife	324[1]	56
4/4/77	Southern	New Hope, Ga.	70	25
9/25/78	PSA	San Diego	135	9
12/28/78	United	Portland, Ore.	7	173
5/25/79	American	Chicago	261	7
10/31/79	Western	Mexico City	61	18
1/13/82	Air Florida	Washington, D.C.	74	8
7/9/82	Pan Am	New Orleans	146	5
		Total	**2,228**	**582**

(1) Does not include 235 KLM passenger deaths.